Supreme Court, U.S.
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92-433

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ARTHUR R. MILLER
Langdell West 227
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4111

PAUL V. CASSISA, SR.
CARL J. GIFFIN, JR.
BERNARD, CASSISA, SAPORITO & ELLIOTT
1615 Metairie Road
Metairie, Louisiana 70055
(504) 834-2612

REX E. LEE *
CARTER G. PHILLIPS
JEFFREY T. GREEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

September 10, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals erred in holding that a plaintiff has an absolute right fraudulently to join a party for the sole purpose of defeating federal diversity jurisdiction so long as the complaint adequately alleges a cause of action against the joined party.

LIST OF PARTIES

The parties to the proceeding below were Sears, Roebuck & Company and Louis J. Barattini, Jr.; the Insurance Commissioner of Louisiana, acting as Liquidator of the Anglo-American Insurance Co., intervened.

Pursuant to Rule 29.1 of this Court, Sears, Roebuck & Company identifies the following as non-wholly owned subsidiaries:

Sears Canada, Inc.
Sears Roebuck de Mexico, S.A. de C.V.
SPS Transactions Services, Inc.

Sears, Roebuck & Company has no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sears, Roebuck & Company, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals is included in the Appendix at 1a-9a. The judgment of the court of appeals appears at 10a. The order of the district court announcing the jury's decision and dismissing respondent's suit is included in the Appendix at 11a. The

memorandum decision of the district court denying remand is included in the Appendix at 12a-13a. The sworn statement of Eric Soileau, which petitioner introduced into evidence in the district court in opposing remand, is also included in the Appendix at 14a-21a.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1446 provides, in pertinent part:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended plead-

> ing, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c) provides in pertinent part:

> (c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

STATEMENT

This case arises out of a flagrant abuse of the removal and remand procedures provided by federal law and a manifest fraud on the district court. The district court below specifically found that respondent joined a resident defendant with no intention of obtaining a judgment and therefore *solely* for the purpose of defeating federal jurisdiction. The court of appeals, however, has adopted a standard for fraudulent joinder which completely ignores overwhelming evidence and findings of bad faith conduct and looks only to the facial validity of the cause of action pleaded against the diversity-destroying defendant.

The Fifth Circuit standard conflicts with this Court's long-established fraudulent joinder cases and reveals a square conflict among the circuits. This Court's holdings allow a party opposing a remand motion to demonstrate that, even when a state law cause of action against the resident defendant is facially valid, the joinder was made in bad faith for the sole purpose of destroying diversity. The central purpose of the removal statute, and the diversity jurisdiction which it protects, is thwarted by a standard which rewards a plaintiff's bad faith pleadings. If left in place, the Fifth Circuit's standard will render a

defendant's right of removal a virtual nullity. In addition, this Court should not permit the Fifth Circuit, and those courts of appeals which have adopted its standard, to overrule *sub silentio* this Court's clear, albeit aged precedents defining fraudulent joinder. Accordingly, certiorari should be granted.

1. Petitioner, Sears, Roebuck & Company, is the defendant in a products liability suit filed by respondent, Louis J. Barattini. On August 25, 1987, respondent injured his hand while operating a Sears ten-inch radial saw. A drill bit that respondent had attached to the saw as an auxiliary device severed tendons in respondent's right hand when he attempted to use the saw to make a cut in a piece of plywood while leaving the drill bit attached and operating. The owner's manual contains a specific warning against such dual use, and, as a jury in federal court ultimately determined, the danger presented thereby was open and obvious to all users, especially an experienced "master carpenter" like respondent. As a result of the accident, respondent lost approximately one-quarter of the use of his right hand.

2. Respondent filed a $2 million products liability suit against petitioner on November 4, 1987 in Civil District Court for the Parish of Orleans, Louisiana. No other defendants were named in that complaint. Petitioner therefore removed the suit to the United States District Court for the Eastern District of Louisiana on November 23, 1987. The case proceeded through many months of discovery.

On April 21, 1988, petitioner noticed the deposition of Eric Soileau, the owner of the Sears radial saw. On occasion, Soileau was an employee or subcontractor of respondent. At that deposition, Soileau was represented by a partner of the same law firm representing respondent. The attorney asserted that she represented Soileau and that all contact with him should be made through her.

She also instructed Soileau not to answer several deposition questions on the grounds that they called for information that was protected by the attorney-client privilege.

A pretrial conference was held and a trial date set for August 1, 1988. In accordance with the district court's order respecting exchange of expert witness reports, petitioner filed its report on May 18. Respondent failed to do so, and instead, on June 24, filed a motion to dismiss voluntarily without prejudice together with a separate motion for leave to amend the complaint and add Soileau as a defendant.

The motion to dismiss was heard before the district court on June 29, 1988. Respondent admitted at the hearing that he was unprepared; he was having trouble obtaining an expert witness and, rather than seek an extension, he decided that "the better course of action would be to bring in another party who is a Louisiana defendant." (6/29/88 Hearing Transcript at p.5.) Respondent asserted that he had a strict liability claim against Soileau as the custodian or "garde" of the saw under Louisiana Civil Code § 2317. Respondent also offered that he had learned at Soileau's deposition that a general warning label had fallen off the saw and not been replaced by Soileau. Respondent therefore claimed he also could recover under a negligence count against Soileau. After specifically cautioning respondent against making an amendment in order to destroy diversity, the court granted respondent's request for leave to amend the complaint.

Respondent filed an amended complaint on July 27 and the district court remanded that same day. More than two years then passed in the state court proceedings without any significant developments. During that time Congress amended 28 U.S.C. § 1446(b) to include a one-year limitation upon removal.

Soileau was served with the amended complaint, but never hired counsel and never answered. With the excep-

tion of service of the complaint, respondent made no effort whatsoever to prosecute his cause of action against Soileau. Respondent's counsel never formally withdrew their representation of Soileau, never sought to compel an answer, never sought discovery, and never moved for a default judgment. Instead, respondent moved to dismiss Soileau voluntarily on February 18, 1991. Respondent's actions are explained in the sworn statement of Soileau taken by petitioner on April 17, 1991, see app. 14a-21a, wherein Soileau reveals that he visited the office of respondent's counsel and was told by both respondent and his counsel that they did not intend to pursue the action against him and that he had no cause for worry.[1] Petitioner filed notice of removal one day after Soileau was dismissed on March 4, 1991. Respondent filed a motion to remand, which was heard before the district court on April 24, 1991.

The district court found that petitioner had met its burden of proving fraudulent joinder by clear and convincing evidence. The court acknowledged that a claim against Soileau conceivably existed under Louisiana law, but found that respondent was engaged in a "blatant attempt to circumvent the federal court's exercise of diversity jurisdiction." App. 13a. As evidence of respondent's bad faith, the court cited the addition of Soileau on the eve of the first trial in federal court, his failure to retain counsel and to answer the complaint, and respond-

[1] *See, e.g.* app. 16a, 18a:

Q. All right. When you had this discussion [with respondent's counsel] did he tell you whether or not he had any intention of pursuing that claim against you?

A. [Soileau] He said he did not.

. . .

A. [Soileau] I think he said I didn't have to worry about it. If I remember right, I think that is what he said.

Q. And do you know what he meant by you don't have to worry about it?

A. That they wasn't after any money from me.

ent's failure to seek a default judgment or to compel an answer. The court rejected respondent's "flaunt[ing of] 28 U.S.C. § 1446(b) as a bar" to removal and, refusing to "elevate form over substance," denied the motion. *Id.*

The case was tried before a jury in November 1991. The jury returned a verdict for petitioner. The district court dismissed respondent's suit. App. 11a.

3. The court of appeals reversed. It did not dispute the accuracy of the district court's factual findings; instead, it held that the district court had applied an incorrect standard in determining whether respondent had fraudulently joined Soileau. The court summarized its standard as follows:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

App. 5a (quoting *B. Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981)) (emphasis in original).

Because there was no allegation of fraud with respect to jurisdictional facts (*e.g.*, as to plaintiff's residence or capacity to be sued), the court of appeals focused on the first prong of this test. The court cited its numerous precedents to support its refusal to look beyond the pleadings to anything other than the validity of the state law claim against Soileau. See app. 7a. Observing that "fraud" in this context has a limited meaning, the court adhered to its view that only the validity of the cause of action is relevant in determining which parties are properly before the court. App. 6a. The court of appeals set aside petitioner's favorable jury verdict, thereby rewarding respondent's bad faith in joining a resident defendant against whom he had no intent to seek judgment.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's fraudulent joinder standard has evolved far afield from this Court's precedents. Although one other circuit has adopted the Fifth Circuit's approach, there is a square conflict with other circuit courts that have adhered to this Court's early opinions. As this Court has observed, "[t]he removal standard, which is nationwide in its operation, was intended to be uniform in its application." *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104 (1941). Certiorari is warranted so that this Court may reaffirm its prior holdings and provide direction and guidance to the courts of appeals and the district courts concerning the proper standard to apply in fraudulent joinder cases.

Certiorari is further warranted because of the significant practical problems the Fifth Circuit's approach creates. The protections of the fraudulent joinder doctrine have become increasingly important since Congress's amendment to the removal statute, limiting the time for removal to one year. This limitation provides greater incentive for plaintiffs to undertake the illegitimate procedural tactics so clearly presented by the record in this case. The legislative history of that amendment reflects Congress's general desire to condemn such tactics.[2] Long ago this Court observed that "[f]ederal Courts should not

[2] Congress intended that the one-year limitation would "reduc[e] the opportunity for removal after substantial progress has been made in state court" and desired to prevent "[s]ettlement with a diversity-destroying defendant on the eve of trial [which would] permit the remaining defendants to remove . . . result[ing] in substantial delay and disruption." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032-33. Here, respondent was engaged in an equally repugnant strategy from the plaintiff's side of the aisle; after substantial progress had been made in federal court following the initial removal, respondent joined a non-diverse party on the eve of trial, thereby abrogating petitioner's right of removal and causing substantial delay and disruption.

sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). This case presents a perfect vehicle for the Court to ensure that plaintiffs, such as respondent here, do not engage in the sharp tactics condemned both by this Court and Congress.

a. This Court's fraudulent joinder cases are all quite old, and although the removal statute has changed little, the Fifth Circuit has adopted a rule clearly at odds with these precedents. In *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921), this Court announced a fraudulent joinder standard that upheld removal under circumstances in which the Fifth Circuit undoubtedly would remand today. The case involved facts similar to those here; an employee sued his diverse employer and a resident co-employee for personal injuries, alleging a statutory claim against the employer and a common law negligence claim against the co-employee. The Court held that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy," *id.* at 97, and upheld the district court's refusal to remand on the ground that the resident party was joined as a defendant "*without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal.*" *Id* at 98 (emphasis added).

Most important, however, was the Court's observation that although the parties differed as to whether joint liability could be imposed under Alabama law, "we do not find it necessary to solve this question." Instead, the Court concluded that "[a]s the joinder was a sham and fraudulent—that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good

faith against the coemployee—*the result must be the same whether the local law makes for or against joint liability*." *Id.* at 98-99 (citing *Wecker*, 204 U.S. at 183; *Chicago, R.I. & Pac. Ry.* v. *Schwyhart*, 227 U.S. 184, 194 (1913)) (emphasis added). Thus, the Court rejected precisely the same test for "liability under local law" applied by the Fifth Circuit. That is, this Court looked directly at the evidence of the plaintiff's lack of intent to seek a joint judgment and, because of the plaintiff's bad faith, upheld the refusal to remand.[3]

The Fifth Circuit's overly narrow fraudulent joinder standard thus represents a significant departure from this Court's precedents, which the Court has never questioned. Review is warranted to reaffirm the continuing validity of these decisions.

b. The Fifth Circuit's long-established standard also conflicts with those applied by other circuit courts of appeals. Both the Third Circuit and the Tenth Circuit apply fraudulent joinder standards that permit the district court to consider not only the validity of the cause of action pleaded against the resident defendant, but also manifest evidence of plaintiff's bad faith in joining a defendant against whom the plaintiff does not intend to seek a joint judgment. *E.g.*, *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 959 (1991); *Abels* v. *State Farm Fire & Casualty Co.*, 770 F.2d 26, 32 (3d Cir. 1985); *Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 881-82 (10th Cir. 1967); *Dodd* v. *Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964).

In *Smoot*, the Tenth Circuit held that "upon allegations of fraudulent joinder designed to prevent removal, fed-

[3] The Court had previously announced a similar standard in *Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146 (1914): "[W]hen . . . a resident defendant is joined with the non-resident, the joinder, *even although fair upon its face*, may be shown by a petition for removal to be only a fraudulent device to prevent removal." *Id.* at 152 (emphasis added).

eral courts may look beyond the pleadings to determine if the joinder, *although fair on its face*, is a sham or fraudulent device to prevent removal." 378 F.2d at 881-82 (citing *Wilson*, 257 U.S. 92 (1921)) (emphasis added). Quoting its earlier decision in *Dodd*, the Tenth Circuit also observed that once a defendant has made specific allegations of a fraudulent joinder, "the court may pierce the pleadings, . . . consider the entire record, and determine the basis of joinder by any means available." *Id.* at 882 (quoting *Dodd*, 329 F.2d at 85).[4] If the district court determines that "continued joinder serves only to frustrate federal jurisdiction" the presence of the resident defendant cannot justify remand. *Id.*

In *Abels*, the Third Circuit announced its standard as follows: "Courts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.*" 770 F.2d at 32 (quoting *Goldberg* v. *CPC Int'l*, 495 F. Supp. 233, 239 (N.D. Cal. 1980)) (emphasis added). Further, the court in *Abels* was careful to note that the "[p]laintiff's conduct in the instant case is consistent with an intention to actually proceed against [the resident] defendants." *Id.*

In contrast, at least one other circuit has adopted the Fifth Circuit's crabbed fraudulent joinder standard. In

[4] "Piercing" or "looking beyond the pleadings" to determine whether a plaintiff has fraudulently joined a diversity-destroying defendant is not a novel proposition. As the Fifth Circuit itself notes (app. 8a), a district court must undertake a factual examination if the fraudulent joinder charge is based upon the false pleading of jurisdictional facts, or that the plaintiff had no basis in fact for bringing the particular cause of action against the resident defendant. *See, e.g., Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 882 (10th Cir. 1967) (court looked "beyond the pleadings" and discovered that 15 months prior to the accident that gave rise to the suit, the allegedly negligent co-employee had left the railroad's employ).

Coker v. *Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983), the Eleventh Circuit stated its standard in unequivocal terms:

> If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.

Id. at 1440-41 (citing *Bobby Jones Garden Apartments* v. *Suleski*, 391 F.2d 172, 177 (5th Cir. 1968) and *Parks* v. *New York Times Co.*, 308 F.2d 474, 477-78 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964)). See also *Boyer*, 913 F.2d at 111 (citing both *Abels* and *Coker* but failing to reconcile the difference in standards). There is no question that this case would now be at an end if it had arisen in either the Third or the Tenth Circuit. Only by blinding itself to manifest fraud did the court of appeals conclude that the judgment in favor of petitioner required reversal. Accordingly, the question whether a multistate defendant such as Sears will be subject to blatantly improper procedural tactics will depend solely upon the state in which it happens to be sued. Such conflict and confusion is especially pernicious when the removal statute was intended to be applied in a uniform fashion, and the conflict raises issues of fundamental procedural fairness.

c. No sensible structural or jurisprudential argument supports the Fifth Circuit standard, making this Court's review particularly appropriate. The Fifth Circuit's appeal to the limited nature of federal diversity jurisdiction, *see B. Inc.* v. *Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981), in justifying its standard only begs the question; in this context fraudulent joinder defines the limits of diversity jurisdiction.[5] The fundamental task

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[5] While the removal and remand statutes are to be construed strictly as well as uniformly, *see Shamrock Oil & Gas Co.* v. *Sheets*,

in determining whether true and complete diversity exists, as this Court's early cases and the commentators note, is sorting out which parties are to be disregarded and which included. See *Wecker*, 204 U.S. at 182-83 (courts should look beyond pleadings and "take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protections of their rights in those tribunals") (quoting *Alabama Great S. Ry.* v. *Thompson*, 200 U.S. 206 (1902)); see also 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3723, pp. 334-54 (2d ed. 1985) (court will realign parties, disregard nominal defendants, and disregard defendants improperly or collusively joined) (hereafter "Wright & Miller"); 1A J. Moore & B. Ringle, Moore's Federal Practice 2d ¶ 0.161[2], p. 272 (1992) ("parties fraudulently joined should be disregarded in determining diversity") (hereafter "Moore's").[6] Cf. *Smith* v. *Sperling*, 354 U.S.

313 U.S. 100, 108-09 (1941), this Court has long recognized that litigants may not rely on formalism to gain unfair advantage; courts need not construe statutes literally where there has been "a fraud upon the law" in attempting to create or defeat diversity jurisdiction. *E.g.*, *Morris* v. *Gilmer*, 129 U.S. 315, 329 (1889) ("If the removal be for the purpose of commiting a fraud upon the law, and to enable the party to avail himself of [federal] jurisdiction . . . and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil[e]") (citation omitted); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) (where there is an "attempt[] to sue in the state courts with a view to defeat federal jurisdiction . . . Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties" of their removal rights).

[6] The Fifth Circuit's standard also can find no support from arguments based upon expediency or objectivity. There is no reason to conclude that a district court inquiry into the validity of a state law cause of action or the accuracy of jurisdictional facts (a party's domicile turns on questions of intent, for example) would be less time consuming than an inquiry into whether the plaintiff's joinder of another party was for the sole purpose of defeating federal jurisdiction. In addition, while the circuit courts may disagree as

91, 97 (1957) ("Absent collusion, there is diversity jurisdiction when the real collision of issues . . . or . . . 'the actual controversy,' is between citizens of different States") (citations omitted). The principle common to the analysis of these commentators and to this Court's fraudulent joinder precedents is that a district court may properly disregard a defendant who would not otherwise be a defendant *but for* the plaintiff's desire to defeat diversity.

This principle, however, cannot rationally be limited to resident defendants against whom no possible cause of action lies (*viz.* plaintiffs who have immunity) and resident defendants against whom there is no factual basis for an allegation (*e.g.*, an allegedly negligent co-employee who in fact had been terminated 15 months before the tortious accident). It also encompasses those resident defendants against whom the plaintiff never intended to proceed or who are in collusion with the plaintiff. See 14A Wright & Miller § 3723 at 350-53 (joinder is fraudulent where plaintiff "does not intend to secure a judgment against that defendant"); 1A Moore's ¶ 0.161[2] at 272 (fraudulent joinder "is said to depend on whether the plaintiff really intended to obtain a judgment against [the non-diverse defendant]"). To be sure, an intent to defeat federal jurisdiction is irrelevant where there are other indicia of a plaintiff's ability and intent to proceed against all defendants. But if—as the district court found here—a plaintiff's *sole* intent is to deprive a defendant of its statutory right embodied in 28 U.S.C. § 1332, then, even if the claim is colorable, that plaintiff has acted in bad faith and the joinder is fraudulent. 14A Wright & Miller § 3723 at 343-47.

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to what constitutes "bad faith," they apply a uniformly heavy evidentiary burden that promotes both expediency and objectivity. *E.g.*, *Dodd* v. *Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964) ("the issue must be capable of summary determination and be proven with complete certainty"); *Parks* v. *New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962) ("A claim of fraudulent joinder must be pleaded with particularity, and supported by clear and convincing evidence"), *cert. denied*, 376 U.S. 949 (1964).

The Fifth Circuit standard thus impermissibly narrows "fraudulent joinder" to guard against only two devices which might be misused in an attempt to defeat jurisdiction—falsely pleading jurisdictional facts and pleading that a state law cause of action exists when in fact none does. The greatest threat to the statutory right of removal, however, comes from the "nominal" defendants who happen to fall within the broad confines of potential civil liability. Hence, the doctrine of fraudulent joinder cannot fully protect a defendant's right of removal unless defendants also are permitted to adduce evidence to show that, but for the desire to defeat federal jurisdiction, the resident defendant party would not have been joined.

* * * *

This case is the proper vehicle through which the Court should reaffirm its earlier fraudulent joinder holdings. The district court found not only that the respondent had stated a conceivable cause of action against the resident defendant, but also that respondent's actions were a "blatant attempt" solely to defeat diversity jurisdiction and deprive petitioner of its statutory right of removal. App. 13a. Thus, the facts below place this case outside the restrictive fraudulent joinder standard applied by the Fifth Circuit, but firmly within the "bad faith" standard set forth in this Court's precedents and those of the Third and Tenth Circuits. This case also presents the most extreme application of the Fifth Circuit's approach. If there is no relief from plaintiff's tactics here, then the protections in 28 U.S.C. § 1332 are rendered meaningless by the sharp practices of the plaintiffs' bar. Accordingly, review by this Court is clearly warranted to correct this recurring abuse of the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR R. MILLER
Langdell West 227
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4111

PAUL V. CASSISA, SR.
CARL J. GIFFIN, JR.
BERNARD, CASSISA, SAPORITO & ELLIOTT
1615 Metairie Road
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JEFFREY T. GREEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

September 10, 1992

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9545

Summary Calendar

LOUIS J. BARATTINI, JR.,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(91-CV-896)

[Filed June 12, 1992]

Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

PER CURIAM: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Louis J. Barattini, Jr., injured his hand while operating a saw owned by Eric Soileau and manufactured by Sears, Roebuck & Co. (Sears). He filed a products liability action against Sears in a Louisiana state court, and, after the action was twice removed to federal court, lost in a trial on the merits. Barattini now appeals, arguing that the district court had no jurisdiction over the case because the second removal occurred after the one-year limitations period of 28 U.S.C. § 1446(b). We agree and vacate the judgment.

I. BACKGROUND AND PROCEDURAL HISTORY

Barattini, a resident of Louisiana, sustained a severe injury to his hand on August 27, 1987, while using a Sears Craftsman 10-inch radial arm saw. Soileau, the owner of the saw, is also a resident of Louisiana. On November 4, Barattini filed a petition for damages against Sears in the Civil District Court for the Parish of Orleans. Alleging diversity of the parties, Sears filed a notice of removal on November 23. The parties conducted discovery, and the case was set for trial on August 1, 1988. On July 27, 1988, however, Barattini amended his complaint, adding negligence and strict liability causes of action against Soileau. In a hearing nearly a month earlier, Barattini had asserted that the availabiilty of a cause of action against Soileau did not come to light until Soileau's deposition was taken in April 1988.[1] Judge Wicker indicated at the hearing that Barattini should add Soileau as a defendant in the federal action, and that she would then grant a motion to remand to state court. After the complaint was amended, Judge Wicker honored this promise.

Although Soileau was served in the state court action, he never filed an answer and never retained a lawyer to represent him. Barattini did not, however, move for

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[1] Barattini stated that he learned at Soileau's deposition that Soileau had neglected to replace a warning label that had fallen off the saw.

a default judgment against Soileau, so Sears filed a "Motion to Compel Plaintiff to Enter Default Judgment Against Defendant Eric Soileau, or Alternatively, Dismiss All Claims Against Eric Soileau. . . ." Barattini thereafter moved to dismiss his claims against Soileau without prejudice, and, on March 4, 1991, the state court granted the motion.

The next day, Sears, again citing complete diversity, removed the case for the second time to federal district court. Sears asserted in a memorandum accompanying that motion that the one-year limit on removal established by the 1988 amendment to 28 U.S.C. § 1446(b) was inapplicable because the joinder of Soileau had been fraudulent. Barattini immediately filed a motion to remand, arguing that joinder was not fraudulent because he had viable causes of action against Solieau under Louisiana law. According to Barattini, the fact that Soileau was insolvent and that it made little sense to pursue a judgment against him was not relevant. After a hearing, the district court held that Sears had carried its burden of proving fraudulent joinder. Although Barattini could proceed against Soileau under Louisiana law, the court held, it would not allow him to evade the substance of the law of fraudulent joinder where his prosecution of the state court action revealed a lack of intent to recover from Soileau. The case proceeded to trial before a jury, and Sears prevailed. Barattini appeals, raising only the issue of the district court's jurisdiction.[2]

II. ANALYSIS

Under 28 U.S.C. § 1446(b), as amended by the Judicial Improvements and Access to Justice Act of 1988, removal of cases on diversity grounds more than one year

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[2] We have jurisdiction over the denial of a motion to remand when it is coupled with the appeal of a final judgment. *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1160 (5th Cir. 1987), *cert. denied*, 493 U.S. 1074 (1990); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. Unit A 1981).

after commencement of the action is prohibited.[3] Courts have agreed that the one-year limitations period applies to cases pending in state court on the amendment's enactment date of November 19, 1988.[4] Because this case was pending in state court on November 19, 1988, and because Sears removed to federal court more than one year after commencement of the action, the plain language of § 1446(b) would appear to bar removal.[5] The only justification asserted by the district court for "tolling" the limitations period was Barattini's fraudulent joinder of Soileau. We need not decide the extent to which fraudulent joinder functions as an implied exception to the one-year limitations period of § 1446(b), because we conclude that the addition of Soileau as a defendant was not fraudulent as defined by our cases.

The removing party bears the burden of establishing fraudulent joinder, *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.), *cert. denied*, 111 S. Ct. 60 (1990); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981), and this burden is a heavy one.

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[3] The statute provides, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

[4] *E.g., Molden v. Firestone Tire & Rubber Co.*, 754 F. Supp. 521, 523 (M.D. La. 1990); *Jennings v. Bunch Trucking Co., Inc.*, 748 F. Supp. 457, 458 (N.D. Miss. 1990); *Royer v. Harris Well Serv., Inc.*, 741 F. Supp. 1247, 1248 (M.D. La. 1990).

[5] We need not determine whether the action was commenced at the time the original state court complaint was filed or at the time the case was renamed, for it is clear that the case was removed more than one year from both dates.

Id. In *B., Inc.*, we summarized the two possible ways a removing party may show fraudulent joinder:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Id. (emphasis in original, citations omitted); *see also Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). There is no dispute that Soileau has at all relevant times been a Louisiana resident, so the second method is unavailable to Sears. What the parties contest is the precise contours of the first method. Barattini argues that joinder is fraudulent only where state law clearly precludes the plaintiff from recovering from the non-diverse defendant. As he did before the district court, Barattini asserts that Article 2317 of the Louisiana Civil Code clearly *grants* him causes of action in negligence and strict liability against Soileau as owner of the saw. Thus, he says, his motive for joining Soileau and his conduct with respect to Soileau in the state court is irrelevant. Sears does not dispute the existence of causes of action against Soileau under Louisiana law, but instead appears to argue in favor of a more expansive view of the notion of fraud. Sears focuses on Barattini's intent not to obtain a judgment against Soileau (as evidenced by Barattini's failure to prosecute the state court action or seek a default judgment), contending that this is "bad faith" conduct which cannot defeat removal. Moreover, Sears says, the rule that joinder is fraudulent when no recovery can be obtained from the non-diverse defendant extends to cases in which there is evidence of no intent to recover.

The rule cited by Barattini has been consistently followed in this circuit. In *B., Inc.*, we described the test for fraudulent joinder as follows:

> If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), *only then can it be said that there has been "fraudulent joinder."*

663 F.2d at 550 (citing *Tedder v. FMC Corp.*, 590 F.2d 115 (5th Cir. 1979) and *Keating v. Shell Chem. Co.*, 610 F.2d 328 (5th Cir. 1980)) (emphasis added). In *Green*, we reiterated the test by stating it in the converse: "[T]here must be no possibility of a valid state cause of action being set forth against the in-state defendant before the court may hold that there has been fraudulent joinder." 707 F.2d at 206 (citations omitted). Earlier cases, too, have held that a defendant can establish fraudulent joinder only by clearly showing the nonexistence under state law of a right of recovery.[6] Thus, consistent with the view that fraud in this context is a term of art, *see* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3723, at 354 (2d ed. 1985), we have been careful to adhere to a strict view of fraudulent joinder. *B., Inc.*, 663 F.2d at 550; *Green*, 707 F.2d at 206; *see also Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989).

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[6] *See Parks*, 308 F.2d at 478 ("there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged"); *Bobby Jones Garden Apts. v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968) ("where there have been allegations of fraudulent joinder . . . the question is whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved").

In *B., Inc.*, we pointed out that in the cases in which we had found fraudulent joinder the plaintiff could establish no cause of action against the non-diverse defendant. Our cases in the intervening decade have been no different. For example, in *Jones v. Newton*, 775 F.2d 1316 (5th Cir. 1985) (per curiam), we held that remand would be improper where the cause of action asserted against the non-diverse defendant was cognizable only in federal court. *Id.* at 1318. In *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987), *overruled on other grounds, Thomas v. Capital Security Serv., Inc.*, 836 F.2d 886 (5th Cir. 1988) (en banc), we affirmed the district court's denial of a motion to remand where state law and a contractual agreement clearly precluded the plaintiffs, sublessors, from suing the non-diverse original lessor. *Id.* at 1123. And in *LeJeune v. Shell Oil Co.*, 950 F.2d 267 (5th Cir. 1992), remand was properly denied where the plaintiff's vicarious liability theory clearly was foreclosed under Louisiana law. *Id.* at 271. *See also Alcom Electronic Exchange, Inc. v. Burgess*, 849 F.2d 964, 969 (5th Cir. 1988) (joinder fraudulent where plaintiff was barred under state law from recovering on a contract claim against an agent); *Carriere*, 893 F.2d at 101 (joinder fraudulent where plaintiff could recover from neither non-diverse defendant under Louisiana law). On the other hand, in the cases since *B., Inc.* in which we have found remand proper, the decision turned specifically on the existence of a state law cause of action. *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 43 (5th Cir. 1992); *Laughlin*, 882 F.2d at 191; *East Texas Mack Sales, Inc. v. Northwest Acceptance Corp.*, 819 F.2d 116, 119 (5th Cir. 1987); *Green*, 707 F.2d at 208.

Sears would have us go substantially beyond this precedent and hold that evidence of Barattini's intent not to prosecute the suit against Soileau in state court functions as an independent basis for a finding of fraudulent joinder. The cases cited by Sears in support of an intent inquiry, however, are faithful to our precedent in

that they turn on the unavailability of a state law cause of action. In *Matthews v. Nissan Motor Co., Ltd.*, 763 F. Supp. 873 (S.D. Miss. 1991), the court commented on the plaintiff's intent in joining a non-diverse defendant, but the ultimate decision to deny a motion to remand was based on the lack of any factual basis under Mississippi law for imposing liability on that defendant. *Id.* at 876 & n.3. And in *Elder v. Wal-Mart Stores, Inc.*, 751 F. Supp. 639 (E.D. La. 1990), the court held that the defendant had met its burden of proving fraudulent joinder because the plaintiff's allegations could not possibly state a cause of action against the non-diverse defendant. *Id.* at 642. Sears certainly is correct that we can "pierce the pleadings" to determine whether joinder was fraudulent, but we do so for the specific purpose of determining whether the plaintiff can possibly recover from the non-diverse defendant. *Carriere*, 893 F.2d at 100. The fact that the evidence behind the pleadings reveals intent to join a defendant for the specific purpose of defeating diversity jurisdiction does not affect the analysis so long as there is a viable cause of action against the defendant. *See generally*, C. Wright, A. Miller & E. Cooper, *supra*, at 345-46.[7]

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[7] The very problem that has arisen in this case was acknowledged in the Practice Commentary to the 1988 Revision of 28 U.S.C. § 1446 (b) (by David D. Siegel) (reproduced following 28 U.S.C. § 1446 (b), Supp. 1991). Professor Siegel points out that a plaintiff desiring to resist removal to federal court may join a non-diverse defendant whom the plaintiff does not really intend to sue but who is arguably liable on the claim under the applicable state law. The plaintiff can languish in state court for more than one year, insulating himself from removal, and then drop the undesired defendant. The only way in which it is suggested a diverse defendant may defeat this ploy is by raising fraudulent joinder. In order to succeed, however, such a defendant must prove convincingly that the plaintiff cannot possibly recover "under the relevant law as applied to the facts as pleaded." *Id.* at 4. Professor Siegel acknowledges that the fraudulent joinder argument will work only rarely, and does not suggest that the doctrine applies where the

We also reject Sears' argument that there was no possible recovery against Soileau due to an agreement between the two that Barattini would not execute on any money judgment he obtained. Sears has not direct evidence of any agreement, but merely cites a statement taken from Soileau several days before the hearing on the motion to remand. Sears apparently did not give Barattini notice of its intent to take this "statement," so Barattini did not have an opportunity to question Soileau. Any interpretation of Soileau's words as evidence of a collusive agreement is quite a stretch in light of the leading questions and lack of cross-examination. In any event, our cases are clear that the relevant question is whether state law, not any other factor, functions as an impediment to recovery.

III. CONCLUSION

We agree with the parties and with the district court that Barattini had valid causes of action against Soileau under Louisiana law. In the Fifth Circuit, the inquiry ends there. The joinder of Soileau being proper, the district court erred in invoking the principles of fraudulent joinder to avoid the one-year limitations period of 28 U.S.C. § 1446(b). The district court had no jurisdiction to hear this case. Accordingly, the judgment is VACATED and the case REMANDED with instructions to remand to state court.

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plaintiff intends to defeat federal jurisdiction but joins a party against whom he clearly has a state law cause of action. *Id.*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9545
Summary Calendar

D.C. Docket No. 91-CV-896

LOUIS J. BARATTINI, JR.,
Plaintiff-Appellant,

versus

SEARS, ROEBUCK & COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court with instructions to remand to the state court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 12, 1992

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 91-896
SECTION "L"

LOUIS BARATTINI

versus

SEARS ROEBUCK AND COMPANY

JUDGMENT

[Filed Nov. 19, 1991]

[Date of Entry Nov. 19, 1991]

Considering the interrogatories answering by the Jury herein; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Sears Roebuck and Company and against, plaintiff, Louis Barattini, dismissing plaintiff's suit at his costs.

New Orleans, Louisiana, this 18th day of November, 1991.

/s/ Veronica D. Wicker
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-0896
SECTION "J" (L)

LOUIS J. BARATTINI, JR.

versus

SEARS, ROEBUCK & COMPANY

MINUTE ENTRY

CARR, J.

April 23, 1991

[Filed Apr. 25, 1991]

[Date of Entry Apr. 26, 1991]

This matter is before the Court on plaintiff's motion to remand. [Document 8]

Determining in its discretion that oral argument is unnecessary, the Court now CANCELS the hearing previously set for April 24, 1991.

The Court recognizes that the changes to 28 U.S.C. § 1446(b) placed a one year limit on a removal action. The court is also familiar with cases interpreting the one year removal provision and its interaction with the doctrine of fraudulent joinder. *Carriere v. Sears, Roebuck*

& Co., 893 F.2d 98 (5th Cir. 1990); *Laughlin v. Prudential Life Insurance Co.*, 882 F.2d 187 (5th Cir. 1989); *Royer v. Harris Well Service, Inc.*, 741 F. Supp. 1247 (E.D. La. 1990). However, the Court finds that those cases are distinguishable because the joinder of the non-diverse party in those cases was not such a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction.

Both the Fifth Circuit and the United States Supreme Court have previously cautioned about using the letter of the law to defeat the substance of the law. *Wecker v. National Enamelling & Stamping Co.*, 204 U.S. 176, 27 S. Ct. 184 (1907); *Panalpina Weltransport GMBH v. Geosource, Inc.*, 764 F.2d 352 (5th Cir. 1985).

Through the submission of depositions and affidavits, Sears has more than met its burden of proving fraudulent joinder. *Green v. Amarada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983). Plaintiff herein joined, on the eve of a federal court trial, a non-diverse defendant against whom a claim conceivably existed under Louisiana law. Because a claim did exist against the non-diverse defendant, Sears was precluded from attempting to remove the action. The non-diverse defendant was served with the amended complaint, but never filed an answer. Nor did the non-diverse defendant ever retain counsel. Plaintiff never motioned for a default judgment against the non-diverse defendant or sought to compel him to file an answer. Instead, plaintiff kept the non-diverse defendant in the state court action for over one year, then dismissed him. Plaintiff now flaunts 28 U.S.C. § 1446(b) as a bar to Sears' removal action.

This Court refuses to condone plaintiff's conduct and, viewing such conduct as an attempt to elevate form over substance, now DENIES plaintiff's motion to remand.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 91-0896
SECTION "L"

LOUIS J. BARATTINI, JR.

VS.

SEARS, ROEBUCK COMPANY

Sworn Statement of ERIC SOILEAU, taken in the home of Eric Soileau located at 150 Destrehan Drive, Destrehan, Louisiana, on Wednesday, April 17, 1991.

APPEARANCES:

BERNARD, CASSISA, SAPORITO & ELLIOTT
(By CARL J. GIFFIN, JR., ESQ.)
P.O. Box 55490
Metairie, Louisiana 70055
1615 Metairie Road
Telephone: 834-2612

Attorney for Sears, Roebuck Company

ERIC SOILEAU,

after having been first duly sworn by the above-mentioned Certified Shorthand Reporter, was examined and testified as follows:

EXAMINATION BY MR. GIFFIN:

Q. Mr. Soileau, my name is Carl Giffin, Jr. We've previously met, and we're here today to take your sworn statement concerning facts surrounding your becoming a defendant in this lawsuit.

You understand the testimony you are going to be giving today is under oath; is that correct, sir?

A. Yeah.

Q. And I guess I will just first ask that you state your name and your address for the record, sir.

A. Eric Soileau. Post Office Box 2. 150 Destrehan Drive. Destrehan, Louisiana.

Q. Mr. Soileau, I am going to be asking you some questions about the manner in which you became a defendant in this lawsuit which has been brought by Mr. Barattini back in the 1988 time frame. Do you recall that you were added as a defendant, sir?

A. Yes, I do.

Q. Okay. Before you were added as a defendant were you ever contacted by either Mr. Barattini or his lawyers to inform you that you were going to be added as a defendant in the case?

A. I think so.

Q. Okay. And what did they tell you as to why they were adding you as a defendant?

A. I think he said to move it to a different court.

Q. To move what to a different court?

A. The suit, I guess.

Q. Okay. And do you remember approximately when that was? The case was set to go to trial on August 1st of 1988. In reference to that time frame, can you give

me an estimate as to when it was that you had this discussion?

A. Not really.

Q. All right. It was sometime before August of 1988?

A. I don't know.

Q. All right.

A. You know, like I said, I don't remember dates too well on stuff like that.

Q. Okay. And who was that conversation with, Mr. Barattini or his lawyer?

A. First with Louis, and then with Joe Ward.

Q. All right. And did they call you on the phone and tell you this?

A. No. They called me into his office.

Q. Did they ever tell you why they wanted to move the case to another court?

A. I don't really remember. I think it had something to do with a jury or something. I don't know.

Q. A jury? What about a jury? Getting a different jury forum or something like that?

A. I think so.

Q. All right. And you say first you met with Mr. Barattini, and then you went to Mr. Ward's office. Do you remember what you discussed at his office?

A. That's what we discussed.

Q. All right. When you had this discussion did he tell you whether or not he had any intention of pursuing that claim against you?

A. He said he did not.

Q. He did not have an intention of pursuing the claim?

A. (Moves head from side to side).

Q. Is that correct?

A. Right.

Q. He told you not to worry about it?

A. Something like that.

Q. Okay. Did he tell you that you didn't need to get a lawyer?

A. I don't think that was discussed.

Q. Okay. Well, can you tell me the substance of the conversation? You said he did not intend on pursuing the claim against you. Can you tell me the substance of that conversation?

A. That's been a long time ago.

Q. I know. Well, basically what he told you about why he didn't want to pursue you.

A. I think it was that the suit wasn't going to be or wasn't going against me. It was going to be against Sears.

Q. So he mentioned that they were going to proceed against Sears and just have you in the suit in name only?

A. I guess that's what it was.

Q. Did they ever demand any money from you as a result of your involvement in the case?

A. No.

Q. Okay. After you had this conversation with Mr. Ward, did you ever talk with him further about the case?

A. No.

Q. After you had that conversation with Mr. Ward at his office were you served with papers in the case?

A. Yes.

Q. I'm just looking for a document here that I have. I have a document here and it's entitled Civil District Court for the Parish of Orleans, and it was directed to Eric Soileau, 150 Destrehan Drive.

It's been attached as Exhibit #14 to Sears list of information pertaining to the removal filed on behalf of Sears, and that shows that the amended petition was served on you on February 8th, 1989.

Do you remember receiving that document and the amended petition, Mr. Soileau?

A. I received something, yeah. You know, I can't say positively this is it; but, I mean, I have no reason to believe that wouldn't be it.

Q. Okay. I am looking to see if there was a signature by you on this document.

A. I didn't sign it.

Q. It says domiciliary service on your wife, but you did receive notice that you had been sued; is that correct, sir?

A. Yes.

Q. After you received notice that you had been sued, did you ever talk with Mr. Ward about the fact that you had received these suit papers?

A. No.

Q. Did you ever talk with Mr. Barattini about the fact that you had received those suit papers?

A. Yes.

Q. What did Mr. Barattini tell you that you should do in connection with receiving those suit papers?

A. That's a good question.

Q. Well, do you remember what you all talked about when you received the suit papers?

A. I think he said I didn't have to worry about it. If I remember right I think that's what he said.

Q. And do you know what he meant by you don't have to worry about it?

A. That they wasn't after any money from me.

Q. And that was in February of 1989. They weren't after any money from you. After that time did you ever have any other conversations with Mr. Barattini concerning the progress of the lawsuit?

A. Not really. I might of asked him when was it ever going to come about, but that's about all.

Q. On any occasion that you spoke with Mr. Barattini after you had been named as a defendant in the case, did he ever tell you that you had to file an answer to that complaint?

A. No, but when I read the thing it said that I had to respond to it or I automatically was—

Q. In default?

A. In default, yes.

Q. Did you discuss that with Mr. Barattini?

A. No, I didn't.

Q. Did Mr. Barattini ever tell you anything other than you didn't have to worry about this suit?

A. Not that I recall.

Q. When is the last time that you recall talking to Mr. Barattini about this suit?

A. It's been a few months. I can't say exactly.

Q. And do you remember what you all discussed at that time?

A. The only thing we ever discussed really about it was when it was going to take place.

Q. Okay. Were you ever informed by Mr. Barattini that the suit had been dismissed as against you?

A. Repeat that.

Q. Did Mr. Barattini ever tell you that the claims that were brought against you had been dismissed?

A. He said he thought they were going to be, but that's about as far as they went.

Q. Did they ever tell you why they were going to dismiss the claims against you?

A. No.

Q. And have you ever received any information from either Mr. Ward or Mr. Barattini indicating that the claims against you have been dismissed?

A. No.

Q. Okay. Was the first time you learned you had been dismissed from the case was when I contacted you?

A. If that's official, yeah, I guess so.

Q. Okay. I had received a notification that you had been dismissed, and then I contacted you. You had no other information that you had been dismissed?

A. No.

Q. After I contacted you did you discuss with either Mr. Ward or Mr. Barattini the fact that you had been dismissed?

A. No.

Q. Okay. Mr. Soileau, I believe those are all the questions I have for you, and I just would like to ask you if the answers that you have given to my questions are truthful to the best of your recollection, sir?

A. They have.

Q. And you have given us your permission on the record to take this statement; is that correct, sir?

A. I guess I have no choice.

Q. No, you do have a choice; but, I mean, you have given it of your own free will; is that correct, sir?

A. Oh, yes, yes.

Q. Thank you very much, Mr. Soileau.

(Whereupon, the taking of the witness' testimony was concluded.)

CERTIFICATE

I do hereby certify that the above-named witness, after having been first duly sworn by the undersigned, by authority of Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950 and amended and re-enacted by Act 85 of the 1968 Regular Session of the Louisiana Legislature, to testify to the truth, the whole truth and nothing but the truth, did testify as hereinabove set forth;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript to the best of my ability and understanding;

That I am not of counsel, not related to counsel or the parties hereto, and not in any way interested in the event of this suit.

/s/ Toni Mortillaro Kawash
Certified Shorthand Reporter

Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

No. 92-433

In The

Supreme Court of the United States

October Term, 1992

SEARS, ROEBUCK & CO.,

Petitioner,

v.

LOUIS J. BARATTINI, JR.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH R. WARD, JR.
(Counsel of Record)
LYNN H. FRANK
BRUCE C. DEAN
WARD & CLESI
One Poydras Plaza – Suite 2100
639 Loyola Avenue
New Orleans, Louisiana 70113
Telephone 504-561-5000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ISSUES PRESENTED FOR REVIEW

1. Did the Fifth Circuit correctly determine that the federal district court had no jurisdiction to hear this personal injury/products liability case when it was removed from the state court more than one year after commencement of the action in violation of 28 U.S.C. § 1446(b)?

2. Did the Fifth Circuit Court of Appeals correctly determine that the doctrine of fraudulent joinder does not apply to a plaintiff who voluntarily dismisses a bona fide non-diverse defendant before trial?

3. Is the Fifth Circuit's fraudulent joinder standard in conflict with the jurisprudence of the Supreme Court of the United States and the other circuit courts or is there any other reason to grant the Petition for Writ of Certiorari?

LIST OF PARTIES IN INTEREST

1. Louis J. Barattini, Jr., plaintiff/respondent
2. Sears, Roebuck & Co., defendant/petitioner
3. Insurance Commissioner of Louisiana as Liquidator of Anglo-American Insurance Co., intervenor

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No. 92-433

In The

Supreme Court of the United States

October Term, 1992

SEARS, ROEBUCK & CO.,

Petitioner,

v.

LOUIS J. BARATTINI, JR.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its Petition for Writ of Certiorari, Sears, Roebuck & Co. asks the United States Supreme Court to redefine "fraudulent joinder" and to create an exception to the 28 U.S.C. § 1446(b) bright line rule limiting removal to a one-year period. Respondent Louis J. Barattini respectfully requests that the well-established law of removal not be disturbed and that Sears' Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Louis J. Barattini (a Louisiana resident) was severely injured on August 25, 1987 when a Sears Craftsman 10-inch radial saw, owned by Eric Soileau, lunged forward on its arm and caused an accessory drill bit to shred the top off his right hand. The bit destroyed muscle tissue, shattered the bone in the ring finger, and severed a tendon.

On November 4, 1987, Barattini filed a products liability suit against the manufacturer of the saw, Sears, Roebuck & Co., in the Civil District Court for the Parish of Orleans – a state court. Sears removed the case to the U.S. District Court in the Eastern District of Louisiana, citing the diversity of the parties. However on July 25, 1988, the district court allowed the plaintiff to amend his petition to join Eric Soileau, the owner of the radial saw, as a defendant. Barattini decided to amend his petition at this time because he had discovered in Soileau's April 28, 1988 deposition a negligence cause of action which offered greater tactical flexibility than the strict liability cause of action which he had previously known about. Inasmuch as Soileau is a Louisiana resident, the district court then remanded the case to state court on July 27, 1988. It was understood at the time of remand that all discovery conducted under the auspices of the federal court could be used in the state court action. Among the discovery conducted was the April 28, 1988 deposition of Soileau.

Prosecution of the case was delayed when the intervening worker's compensation carrier, Anglo-American Insurance Co., went into liquidation and filed a Motion

and Order to Stay Proceedings. Not until January 11, 1991 did counsel enroll for the Insurance Commissioner of Louisiana in its capacity as the liquidator of Anglo-American Insurance Co. At that point, plaintiff and defendant Sears sought to set the case for trial. The trial court refused to schedule a trial date until Eric Soileau answered the Petition for Damages. Sears filed a pleading styled "Motion To Compel Plaintiff To Enter Default Judgment Against Defendant, Eric Soileau, Or Alternatively, Dismiss All Claims Against Eric Soileau In Order That This Matter Might Be Set For Trial." (R.164).

Although Soileau was a bona fide defendant under Louisiana law, he had no insurance and no money to pay a judgment. He could not afford to pay an attorney to answer the petition. The plaintiff decided to dismiss Soileau *without prejudice*, relying on the plain language of 28 U.S.C. § 1446(b) to protect his choice of forum. It should be noted that this amendment to the removal statute became effective on November 19, 1988 and changed the law on removal by reason of diversity.[1]

This was the moment that Sears was waiting for. Despite the fact that the parties were seeking a trial date in state court, Sears removed the case to federal court again and opposed plaintiff's motion to remand with the claim that the one-year limitation period did not apply because the plaintiff had engaged in "fraudulent joinder."

A few days before the hearing on the motion to remand, Sears took what purported to be a "statement"

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[1] *Greer v. Skilcraft*, 704 F.Supp. 1570 (N.D.Ala. 1989).

by Soileau concerning Barattini's alleged "lack of intention to seek a judgment against him." Since Barattini had no notice of this secret deposition, Sears was able to ask leading questions, put words into Soileau's mouth, and seek admission of legal conclusions that Soileau was not competent to address. Nothing in the Soileau transcript suggests that Barattini told him not to hire a lawyer or that Barattini made secret covenants with him. Although Soileau said that Barattini did not expect to collect any money from him, this statement does not mean that Barattini did not intend to pursue a judgment. The transcript further shows that Sears quickly supplied its own desired answers whenever Soileau expressed uncertainty or lack of recollection.[2]

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[2] For example, the following exchange can be found on pp. 17a and 18a of Sears' Petition:

Q: You said he did not intend on pursuing the claim against you. Can you tell me the substance of that conversation?

A: That's been a long time.

Q: Well, basically what he told you about why he didn't want to pursue you?

A: I think it was that the suit wasn't going against me. It was going to be against Sears.

Q: So he mentioned that they were going to proceed against Sears and just have you in the suit in name only?

A: I guess that's what it was.

. . . .

Q: Do you remember what you all [Soileau and Barattini] talked about when you received the suit papers?

A: I think he said I didn't have to worry about it. If I remember right, I think that's what he said.

The district court denied plaintiff's motion to remand, finding that Barattini "had used the letter of the law to defeat the substance of the law" and that plaintiff was flaunting 28 U.S.C. § 1446(b).[3] Since this was not an appealable judgment, the plaintiff had no choice but to go to trial.[4] After the trial, the district court entered a judgment against the plaintiff, dismissing its claim against Sears.

The plaintiff appealed from this judgment. The United States Court of Appeals for the Fifth Circuit agreed with Barattini that the federal courts did not have jurisdiction over this case, vacated the judgment, and remanded to state court. In reaching this conclusion, the Fifth Circuit held that the plain language of 28 U.S.C. § 1446(b) would appear to bar removal of the case by Sears. The Fifth Circuit further held that joinder of Eric Soileau as a defendant was not "fraudulent" within the meaning of the well-established removal jurisprudence. It therefore did not consider whether it should create a judicial exception to the one-year removal bar. The Fifth Circuit found that publication of its per curiam opinion was unnecessary under Local Rule 47.5.[5] Finally, the Fifth

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Q: And do you know what he meant by you don't have to worry about it?

A: That they wasn't after any money from me.

[3] Not knowing that 28 U.S.C. § 1446(b) would be enacted after he added the non-diverse defendant, Barattini could not have intended to use the new rule to "beat the system."

[4] *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981).

[5] "The publication of opinions that have no precedential value and merely decide particular cases on the basis on well-established law imposes needless expense on the public

Circuit made a point of discrediting the Soileau "statement": "Any interpretation of Soileau's words as evidence of a collusive agreement is quite a stretch in light of the leading questions and lack of cross examination." *See* p. 9a of Sears' Petition.

Sears asks the U.S. Supreme Court to exercise its discretionary powers to review this opinion of the Fifth Circuit. Barattini asks the Court to deny certiorari because the law of removal and fraudulent joinder is well-settled and because there is no reason to rewrite the law according to Sears' specifications.

ARGUMENT

1. 28 U.S.C. § 1446(b) Creates a Bright Line Rule Prohibiting Removal of a Case More than One Year After Commencement of the Action.

Strict Construction of Removal Statutes

Congress and the U.S. Supreme Court have always required the strict construction of statutes concerning removal.

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of federal courts on removal, but the policy of the successive acts of Congress

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and burdens on the legal profession." Rule 47.5 of the United States Court of Appeals for the Fifth Circuit. It is interesting to note that the Fifth Circuit already has more modern fraudulent joinder cases than any other circuit court and is frequently cited by the district courts in other circuits.

> regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). Three principles mandate this policy: (1) limited federal jurisdiction, (2) comity with the state courts, and (3) the right of the plaintiff to prosecute his own suit in his own way. *Green v. Amerada Hess Corp.*, 707 F.2d 201, 206 (5th Cir. 1983), *cert. denied* 464 U.S. 1039 (1939); *Parks v. N.Y. Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied* 376 U.S. 949 (1964).

Before passing the 1988 Judicial Improvements and Access to Justice Act, Congress initially considered total elimination of diversity jurisdiction. Although this extreme step was not taken, Congress did make some changes to reduce the number of diversity cases that would be adjudicated in the federal courts. 28 U.S.C. § 1332(a)-(c). The language added to 28 U.S.C. § 1446(b) has a similar effect:

> A case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

1988 U.S. Code Cong. & Adm. News 5982 indicates that the result of this amendment "is a modest curtailment in access to diversity jurisdiction." *Id.* at 6032. In commentary published in the U.S. Code Annotated (West 1992), David D. Siegel explains that this rule is "just as sensitive and demanding in its way as a *statute of limitations*" (emphasis supplied).

Judicial interpretation of the rule has, in fact, followed the policy of strict construction, treating 1446(b) as a bright line rule rather than an invitation to a case-by-case application. In *Rezendes v. Dow Corning Corp.*, 717 F.Supp. 1435 (E.D.Cal. 1989), for example, the court remanded to state court an action that was filed in 1987 and not served until 1989. The *Rezendes* Court explained that Congress did not amend the removal statute so as to give federal courts discretion to allow removal of diversity actions more than one year old. "Rather Congress has clearly expressed its intent in the plain language of 28 U.S.C. § 1446(b) that a diversity case which has been before a state court for more than one year should stay there." *Id.* at 1438. Responding to the defendant's warning that plaintiffs could manipulate their cases, the *Rezendes* Court further explained: "Contrary to defendant's argument, Congress apparently *did* envision that plaintiffs seeking to avoid removal from state court would have the ability to prevent removal of actions based upon diversity." *Id.* at 1439 n. 3. *See also Phillips v. Allstate Insurance Co.*, 702 F.Supp. 1466 (C.D.Cal. 1989).

Similarly, in *Royer v. Harris Well Service Inc.*, 741 F.Supp. 1247 (M.D.La. 1990), the district court remanded a personal injury case that was filed in 1984 against Harris Well Service and Shell Oil even though a state court created diversity when it ruled in 1989 that Harris had tort immunity under the Worker's Compensation Act. The *Royer* Court found that 28 U.S.C. § 1446(b) placed a one-year limitation on removal of diversity cases.

Retroactivity of 28 U.S.C. § 1446(b)

It is well established that changes in procedure are applied to pending litigation "absent some contrary indications by the Congress and absent any procedural prejudice to either party." *Denver & Rio Grande Western Rail Road Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563, 87 S.Ct. 1746, 1750 (1967). According to the Supreme Court, "No one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71, 69 S.Ct. 944, 953 (1949).

Because of this principle of retroactivity, almost all courts have retroactively applied 28 U.S.C. § 1446(b) to cases pending in the state courts on November 19, 1989, the date of the statute's enactment. *Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989); *Greer v. Skilcraft*, 704 F.Supp. 1570 (N.D.Ala. 1989) (*en banc*); *Royer v. Harris Well Service, Inc.*, 741 F.Supp. 1247 (M.D.La.1990).

> Removal of diversity cases to federal court, while stemming from a constitutional source, is basically a matter of procedure, and is dependent on the scope of Congressional enactments. Removal affects the forum where a dispute is to be resolved, not the substantive merits of a dispute. Indeed, the federal court after removal would be obliged to apply the same substantive rules of decision which the state court is to apply.

Greer, 704 F.Supp at 1579-80.

Since 28 U.S.C. § 1446(b) provides that a case may not be removed more than one year after *commencement* of the action, it should be noted that the case commences when the original complaint is filed. LSA-C.C.P. art. 421; *Royer*.

If an amended complaint changes the essential character of a lawsuit, then the commencement would be the date of filing of the amended complaint. *Fletcher v. Hamlet*, 116 U.S. 408, 6 S.Ct. 426, 29 L.Ed. 679 (1886).

28 U.S.C. § 1446(b) Applies to Barattini

As in *Royer* and the other cited cases, Barattini's cause of action accrued before the effective date of this amendment. The original lawsuit was filed on November 4, 1987 and the amended lawsuit was filed on July 27, 1988. The amended lawsuit did not change the essential character of the action; it was still an action based on personal injury. The only difference was that a second defendant was added. However, whether the first or the second date is considered the "commencement" of the action, the removal undertaken by Sears came more than a year later on March 5, 1991 – 39 months after the first date and 32 months after the second date.

Under either analysis, 28 U.S.C. § 1446(b) should be applied to Barattini.

2. There Can Be No Fraudulent Joinder When a Plaintiff Adds a Non-Diverse Defendant Who Has Potential Liability Under State Negligence and Strict Liability Law.

Definitional Requirements of Fraudulent Joinder

"Fraudulent joinder" is a term of art. It means one of two things: (1) a plaintiff has added a defendant against whom he has no possible cause of action or (2) a plaintiff

has lied in his jurisdictional allegations. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S.Ct. 84 (1931); *Parks v. N.Y. Times Co.*, 308 F.2d 474 (5th Cir. 1962); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983); *McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987); *Sessions v. Chrysler Corp.*, 517 F.2d 759 (9th Cir. 1975); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992).

Although fraudulent joinder may be committed in an effort to prevent diversity jurisdiction, the converse is not true. Every effort to prevent diversity jurisdiction does not result in fraudulent joinder. The Supreme Court has held that the motives of the plaintiff in joining a party are absolutely irrelevant:

> In a removal proceeding, the motive of the plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined.
>
> It has been uniformly held that, where there is a prima facie joint liability, averment and proof that the resident and nonresident tortfeasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent and will not justify a removal from state court.

Mecom v. Fitzsimmons Drilling Co., 52 S.Ct. 84 (1931). Even if a defendant is judgment-proof, the courts will not examine the motives of the plaintiff.

> [T]he motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, [the plaintiff] has an absolute right to enforce it, whatever the reason that makes

> him wish to assert the right. Hence the fact that the [diversity defendant] is rich and the [non-diversity defendant] poor does not affect the case.

Chicago, Rock Island & Pacific Railway Co. v. Schwyhart, 227 U.S. 184, 193, 33 S.Ct. 250, 251 (1913). To the extent that the courts even mention the "intent" of the plaintiff to pursue a judgment, the standard of evaluation is an objective one:

> There can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of law as they exist when the petition to remand is heard. One or the other at least would be required before it could be said that there was no real intention to get a joint judgment, and that there was no colorable ground for so claiming.

Parks, 308 F.2d at 478. This Fifth Circuit's objective interpretation of "intention" is supported by Sears' co-counsel, Professor Arthur Miller, in his treatise on federal procedure:

> A party will be considered fraudulently joined when plaintiff has not stated a claim for relief or does not intend to secure a judgment against that defendant. But there need be only a possibility that a right to relief exists to avoid this conclusion, and plaintiff's ultimate failure to obtain a judgment is immaterial. [F]raud is a term of art.

14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3723 (2d ed. 1985). *See also Nosonowitz v. Allegheny Beverage Corp.*, 463 F.Supp. 162 (S.D.N.Y. 1978):

> Whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intended to judgment against the resident defendants. That intent is measured by objective indices.

Id. at 163. Similarly, *Quinn v. Post*, 262 F.Supp. 598, 603 (S.D.N.Y. 1967) has explained that a "joinder is fraudulent if the allegations . . . with respect to the defendant are shown to be so clearly false and fictitious that no factual basis exists for an honest belief [in] . . . liability."

In a case involving alleged fraudulent joinder, the court must evaluate all factual allegations and all contested issues of substantive law in the light most favorable to the plaintiff. On review, the court of appeals does not defer to the findings of the district court but determines for itself if there was proper joinder. The party seeking removal from state to federal court has a heavy burden in establishing federal jurisdiction and in proving that there is fraud on the part of the plaintiff. *B. Inc. v. Miller Brewing Co.* 663 F.2d 545 (5th Cir. 1981).

No Fraudulent Joinder in Barattini

Despite its general condemnation of Barattini, Sears has never alleged that he fraudulently pleaded the residence of the second defendant, Eric Soileau. As indicated in the Amended Complaint and on the cover page of the ex parte deposition taken by Sears, Mr. Soileau was at all material times a resident of Destrehan in St. Charles Parish, State of Louisiana. Of the two possible ways of establishing fraudulent joinder, fraudulent pleading of jurisdictional facts does not apply.

Nor did Barattini attempt to join a defendant against whom he had no cause of action. He had, in fact, two causes of action against Eric Soileau. The first cause was known from the beginning: Soileau was liable as the owner of a defective thing under LSA-C.C. art. 2317; *Brown v. Sears, Roebuck & Co.*, 514 So.2d 439 (La. 1987); *Ross v. La Coste de Monterville*, 502 So.2d 1026 (La. 1987).

The second cause of action became apparent in Soileau's April 28, 1988 deposition in which he stated that there had been a warning sign on the table saw when he purchased it, but it had fallen off and he had neglected to replace it. If a jury found under Louisiana's duty-risk analysis that this negligence was a proximate cause of Barattini's injury, then he would have been liable under LSA-C.C. art. 2315; *Hill v. Lundin*, 256 So.2d 620 (La. 1972).

The two alleged causes of actions are not novel, impossible or far-fetched. They are standard personal injury causes of action precluded by no worker's compensation or other immunity. The factual underpinnings are supported by Soileau's April 28, 1988 deposition and the theories of liability are clearly delineated in the Amended Complaint:

> Defendant, Eric Soileau, shared in the fault, negligence, and/or strict liability of Sears in the following respects:
>
> a) Having Garde over a defective and dangerous instrumentality.
>
> b) Failing to warn Louis Barattini of the hazards attendant to the use of the saw.

c) Failing to replace a warning sign that fell off the saw.

d) Any and all other acts of negligence, fault, and/or strict liability which may be discovered at the trial of this matter.

Under these circumstances, remand by the district court was appropriate. After making sure that plaintiff had a bona fide cause of action against Soileau and ordering that plaintiff amend his complaint within one week to make these allegations, the district court then sent the case back to state court as directed by mandatory language in the Fifth Circuit jurisprudence:

> If there is even a possibility that a state court would find a cause of action stated against . . . the in-state defendant on the facts alleged by the plaintiff, then the federal court *must* find that the in-state defendant [has] been properly joined, that there is incomplete diversity, and that the case *must* be remanded to the state courts.

B. Inc., 663 F.2d at 550.

Finding of Proper Joinder Is Res Judicata

The July 27, 1988 decision of the district court to allow joinder of Eric Soileau and to remand to state court is not reviewable by the court of appeal or the district court. 28 U.S.C. § 1447(d); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981). It became the law of the case and it was error for the district court to re-open that issue in its April 24, 1991 hearing.

No Authority for District Court Rule

Barattini further suggests that its representations to the district court in 1988 were truthful. He intended to prosecute the case against Soileau and would not have dismissed him from the suit without prejudice if a change in the procedural law – 28 U.S.C. § 1446(b) – had not invited him to do so. When the decision to dismiss was made on the advice of Barattini's expert (so as not to distract from the stronger case against Sears) and in the face of economic realities (Soileau had no insurance and no money to hire an attorney to answer), it was a strategic decision made on the eve of trial – the kind of decision that attorneys make constantly and which are neither fraudulent nor unethical.

To confuse trial tactics with fraudulent joinder is something authorized by no statute or jurisprudence. No case has been cited in memorandums or in the April 24, 1991 Minute Entry which justifies a two-years-later finding of fraudulent joinder when a bona fide non-diverse party is dismissed from a suit without prejudice by a plaintiff.

The district court speaks of "blatant attempts to circumvent the federal court's exercise of diversity jurisdiction," forgetting that plaintiffs have historically been allowed to prevent removal to federal court as long as their joinder of parties was not "fraudulent" and that the Supreme Court has always taught that the *motive* for joinder of a non-diverse party is immaterial.

Sears offers a new definition of fraudulent joinder for the consideration of This Honorable Court:

> [A] district court may properly disregard a defendant who would not otherwise be a defendant but for the plaintiff's desire to defeat diversity.

Petition at p. 14. With all due respect to the distinguished counsel recruited by Sears to argue its case, Barattini must point out that the Sears Rule of Fraudulent Joinder has been enunciated by no court in the United States. Barattini respectfully asks the Court to reject this effort by Sears to rewrite the rules of federal diversity jurisdiction.

3. There Is No Reason To Grant The Petition For Certiorari

Sears has failed to show any special or important reasons why the U.S. Supreme Court should grant its petition. Sears misstates the well-established law of the Supreme Court and presents an incomplete and distorted view of the cases in the other circuits. Trying to manufacture an appearance of conflict among the circuits, Sears neglects to mention that virtually every circuit has cited the Fifth Circuit fraudulent joinder jurisprudence with approval. A case by case review, while tedious, will reveal the emptiness of Sears' argument and show no support for the Sears Rule of Fraudulent Joinder. A sampling of cases from other circuits will then demonstrate that the Fifth Circuit has been cited with approval throughout the country.

Supreme Court Cases

Sears claims that *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) stands for the proposition that fraudulent joinder exists because a plaintiff does not intend to

prosecute a case in good faith. Sears further claims that the bad faith of Wilson was the reason that the Supreme Court did not consider whether the Alabama law governing this case would provide a cause of action against the defendant.

Sears' discussion ignores the facts in the case and the Supreme Court analysis. What really happened was that Wilson (an Alabama resident) sued his employer (a New Jersey corporation) and a co-worker (an Alabama resident) for an injury that he sustained on the job. The employer sought removal on the grounds that the co-worker was not present when the accident occurred and did nothing to cause the accident. Because of the plaintiff's failure to traverse the employer's fraudulent joinder allegations, the Supreme Court had to hold that there was no factual basis for making the co-worker a defendant. Thus, the Supreme Court did not have to make an inquiry as to whether Alabama law would recognize a cause of action against a co-worker. It was the failure of the factual underpinnings that demonstrated fraudulent joinder. It was not a lack of intent to prosecute, in and of itself, that created fraudulent joinder.

Here are the words of the Supreme Court with emphasis added to the appropriate phrase:

> As the joinder was a sham and fraudulent – *that is, without any reasonable basis in fact* and without any purpose to prosecute the cause in good faith against the co-employee. . . .

Id. at 98 (emphasis supplied). It is important to note the use of the word "and" in this passage. An alleged lack of

intention to prosecute is not sufficient by itself to create fraudulent joinder.

The facts in the *Wilson* case can be distinguished from the facts in the Barattini case. Louis Barattini had a viable cause of action against Eric Soileau under the facts and the law of Louisiana. Sears' attempt to apply *Wilson* to Barattini is as misleading as its statement that the Fifth Circuit would undoubtedly remand *Wilson* if it were called upon to review the case today. In *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir. 1990), *cert. denied* 111 S.Ct. 60 (1991), after holding that the plaintiffs had no factual basis for asserting a cause of action against various non-diverse defendants, the Fifth Circuit did not hesitate to find fraudulent joinder and to affirm federal jurisdiction over the case.

Similarly, Sears misrepresents the holding in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1906). Conrad Wecker (a Missouri resident) sued his employer and two co-workers for his job-related injuries. The court found that one co-worker was a resident of Illinois who had not been served and the other co-worker was a mere clerical worker with no responsibility for the conditions causing the plaintiff's injury. Because the non-diverse defendant had no factual connection with the case, the court refused to remand.

Sears is correct in stating that the district court can "pierce the pleadings" to determine whether joinder is fraudulent, but this case shows that the reason for the scrutiny of the affidavits and other evidence was to determine whether the plaintiff had support under the law and

the facts for his cause of action. When the court determined that the factual underpinnings were deficient, it concluded that the plaintiff had wrongfully joined the non-diverse defendant just to be able to defeat federal diversity jurisdiction. On the other hand, if the plaintiff had joined a defendant against whom he had a viable cause of action, the court would not have interfered with his choice of forum.

Sears goes far afield in citing *Morris v. Gilmer*, 129 U.S. 315 (1889) for the proposition that the court must examine the "intentions" of the plaintiff. *Gilmer* concerns the "intention" of Morris to change his domicile from Alabama to Tennessee rather than the intention of Morris to pursue a judgment against a bona fide non-diverse defendant. Instead of *Gilmer*, Sears should have been examining *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931) in which the Supreme Court explained that the naming of a Louisiana administrator by the estate of an Oklahoma man in order to defeat federal jurisdiction was not fraudulent.

> It has been uniformly held that, where there is a prima facie joint liability, averment and proof that resident and nonresident tortfeasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court.

Id. at 189. Further, Sears should have read *Chesapeake & Ohio Railway v. Cockrell*, 232 U.S. 146 (1914) more carefully. *Chesapeake* clearly shows that bad faith means joining a defendant when there is no reasonable basis to support the cause of action against him:

> [T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.
>
> . . . .
>
> Of course, [the plaintiff's claim against the railway employee] *was not [merely a fraudulent device to prevent removal] unless it was without any reasonable basis.*

Id. at 152-53.

The Circuit Courts

Sears cites two cases from the Third Circuit and two cases from the Tenth Circuit, claiming that their fraudulent joinder jurisprudence is in conflict with that of the Fifth Circuit. A careful reading of these cases destroys this claim.

Abels v. State Farm Fire & Casualty Co., 770 F.2d 26 (3d Cir. 1985) recommends a two-part analysis for determining whether a fictitiously named defendant can defeat diversity jurisdiction. Part of this analysis concerns "indicia of fraudulent joinder" such as a failure to seek the actual names of the defendants, a failure to join the John Does, or a failure to serve them. However, *Abels* carefully limits its guidelines to John Doe cases. The court can determine for itself whether a plaintiff has a viable state law claim against a known defendant, but it cannot determine whether a fictitiously named defendant is anything but a phantom unless the plaintiff actually does something to bring the true identity to light. Recognizing the qualitatively different problems that fictitiously named defendants have caused in certain circuits, Congress has

since *Abels* amended 28 U.S.C. § 1441(a) to curtail the practice.

The rules outlined for the John Doe cases do not apply to ordinary diversity cases. Nor do they serve as a basis for claiming that the Third Circuit is in conflict with the Fifth Circuit. As *Abels* emphasizes, "The fact that the plaintiffs' motive for joining a John Doe is to defeat diversity is not considered indicative of fraudulent joinder." *Id.* at 98. Moreover, the second case cited by Sears, *Boyer v. Snap-On Tools, Inc.*, 913 F.2d 108 (3d Cir. 1990), *cert. denied* 111 S.Ct. 959 (1991) cites both *Abels* and a whole series of Fifth Circuit cases with equal approval and no apparent contradiction. The *Boyer* analysis parallels the Fifth Circuit analysis:

> [W]e note first that there is no suggestion by defendants that plaintiffs have falsely alleged their Pennsylvania citizenship or that of Baldwin and Kaiser. In other words, this is not a situation where "there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *see Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied* 464 U.S. 1039 (1984).
>
> Second, this is not a case where the action against the individual defendants is defective as a matter of law. *See* 1A *Moore's Federal Practice* ¶ 0.16[2] at 274 ("The joinder may be fraudulent if the plaintiff fails to state a cause of action against the resident defendant and the failure is obvious according to the settled rules of the state").

Boyer does not inquire into the subjective intent of the plaintiffs to pursue a judgment. In fact, it mandates remand "if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants." *Id.* at 111. Finally, the Third Circuit states that the plaintiffs have the right to structure their complaint in any way that they desire even if the naming of defendants has repercussions on jurisdiction. The federal rules forbid only the collusive joining of parties to create federal jurisdiction – not the naming of parties from whom one cannot collect money in order to defeat jurisdiction.

> As the commentary in the highly regarded *ALI Study of the Division of Jurisdiction between State and Federal Courts* (1969) notes, "there is a qualitative difference between a device designed to invoke federal jurisdiction and one designed to avoid it. In the former instance, the already over-burdened federal courts are being asked to adjudicate a case that, in the absence of the device, would fall outside their statutory and perhaps their constitutional competence. In the latter, if the device succeeds, a case depending on state law merely remains in the state court."

Id. at 111.

Other Third Circuit cases, such as *American Dredging Co. v. Atlantic Sea Con, Ltd.*, 637 F.Supp. 179 (D.N.J. 1986) cite Fifth Circuit cases with approval and emphasize that "fraudulent joinder" is a term of art.

> In this context, the term "fraudulent joinder" does not require a showing of fraud in the conventional sense; it in no way reflects on the integrity of plaintiff or plaintiff's counsel. . . .

> The standard . . . has been articulated by Professor Moore in the following manner: . . . .
>
> If, however, there is a real possibility that the plaintiff has stated a cause of action, the joinder is not fraudulent, and the case should be remanded. 1A Moore's Federal Practice ¶ 0.16[2].

Sears' claim that the Tenth Circuit standard for fraudulent joinder conflicts with the Fifth Circuit standard is just as false as the claim about the Third Circuit. *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82 (10th Cir. 1964) holds simply that the joinder of a defendant against whom no cause of action is stated is a sham. *Smoot v. Chicago, Rock Island & Pacific Railroad Co.*, 378 F.2d 879 (10th Cir. 1967) offers the same holding and even cites a Fifth Circuit case as its authority: *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962).

Other Circuits Support The Fifth Circuit

To drive home his point that the Fifth Circuit fraudulent joinder jurisprudence is not contrary to the jurisprudence of any other circuit, Barattini offers the following partial list of cases that have cited the Fifth Circuit with approval or followed guidelines similar to those of the Fifth Circuit:[6]

---

[6] Cases that do not actually cite the Fifth Circuit cases are marked with an asterisk.

First Circuit

Futurama Import Corp. v. Kaysons International, 304 F.Supp. 999 (D.P.R. 1969)

Second Circuit

American Mutual Liability Insurance Co. v. Flintkote Co., 565 F.Supp. 843 (S.D.N.Y.1983)

Nosonowitz v. Allegheny Beverage Corp., 463 F.Supp. 162 (S.D.N.Y.1978)

Third Circuit

Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990)

Fourth Circuit

Rinehart v. Consolidation Coal Co., 660 F.Supp. 1140 (N.D.W.Va. 1987)

Sixth Circuit

Bucksnort Oil Co. v. National Convenience Stores, 585 F.Supp. 883 (M.D. Tenn. 1984)

Saylor v. General Motors Corp., 416 F.Supp. 1173 (E.D.Ky. 1976)

Seventh Circuit

Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992)

Fields v. Reichenberg, 643 F.Supp.777 (N.D.Ill. 1986)

Eighth Circuit

Brown v. Southland Corp., 620 F.Supp. 1495 (E.D.Mo.1985)

Ninth Circuit

**McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987)

**Sessions v. Chrysler Corp.*, 517 F.2d 759 (9th Cir. 1975)

Frontier Airlines, Inc. v. United Air Lines, Inc., 758 F.Supp.1399 (D.Colo. 1989)

Tenth Circuit

Smoot v. Chicago, Rock Island & Pacific Railroad Co., 378 F.2d 879 (10th Cir. 1967)

Eleventh Circuit

Charest v. Olin Corp., 542 F.Supp.771 (N.D.Ala.1982)

Practical Considerations and Congressional Intent

Sears suggests that the rule on fraudulent joinder should be changed because the new one-year bar on removal will encourage unscrupulous plaintiff lawyers to engage in "illegitimate procedural tactics." However, the practical effect of Sears' suggestion is a proliferation of district court hearings on the motives and intentions of plaintiffs who join resident defendants to their cases. Under the Sears Rule, district courts would even be required to re-open remand hearings on the basis of

actions that occur years after remand is ordered. The 1988 Judicial Improvements and Access to Courts Act was intended to constrict diversity jurisdiction. The Sears Rule flies in the face of Congressional intent and replaces bright line rules with laborious use-by-case analysis.

The Hidden Agenda

The only conclusion that can be drawn from an examination of the 1988 Judicial Improvements and Access to Courts Act and of the jurisprudence of fraudulent joinder is that Sears has misrepresented the law. There is no conflict between the Fifth Circuit and the Supreme Court or the other circuits. There is no Congressional mandate to increase the number or the nature of removal hearings. What Sears really wants is a change in the law to make diversity jurisdiction easier to obtain. Barattini suggests that the place to accomplish tort reform is in Congress and urges the Court to decline Sears' invitation to judicial activism.

CONCLUSION

Following the plain meaning of 28 U.S.C. § 1446(b) and the 100-year-old jurisprudence of fraudulent joinder, the U.S. Court of Appeals for the Fifth Circuit properly remanded this case to the state courts of Louisiana. Respondent, Louis J. Barattini respectfully asks this

Honorable Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

JOSEPH R. WARD, JR.
(Counsel of Record)
LYNN H. FRANK
BRUCE C. DEAN
WARD & CLESI
One Poydras Plaza – Suite 2100
639 Loyola Avenue
New Orleans, LA 70113
Telephone 504-561-5000

Attorneys for Respondent,
Louis J. Barattini, Jr.

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BRIEF *AMICI CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITION

VICTOR E. SCHWARTZ
LUTHER ZEIGLER *
KATHRYN D. KIRMAYER

CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Amici Curiae

* Counsel of Record

October 13, 1992

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INTERESTS OF AMICI CURIAE

The Product Liability Advisory Council, Inc., is an association of industrial companies formed for the purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. Its members include about 100 major manufacturers and 300 defense attorneys.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is affili-

ated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. NAM members are defendants in cases nationwide and are interested in the fair administration of justice, which includes the right to seek diversity jurisdiction in appropriate circumstances.

Amici file this brief to alert the Court to the broad significance this case has to all manufacturer defendants.[1] The petition raises an issue at the very core of a defendant's right to seek the protection of an impartial federal forum in cases arising under the federal courts' diversity jurisdiction. Such jurisdiction was initially conceived as a safe harbor for out-of-state defendants to avoid the "state prejudices, state jealousies, and state interests" inherent in defending an action brought by a resident plaintiff in state court. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). The decision below threatens to undermine this fundamental right by depriving the federal courts of their ability to ferret out the fraudulent practice of joining non-diverse defendants solely for the purpose of destroying federal jurisdiction. Indeed, if the Fifth Circuit's "strict view of fraudulent joinder" is permitted to stand, the right of out-of-state defendants to have their cases heard before a neutral federal forum may well become a virtual nullity, easily defeated by plaintiffs' artful pleading and sharp practices.

Amici, representing those who develop, manufacture and sell consumer products in this country, have a particularly strong interest in maintaining the integrity of federal diversity jurisdiction. Routinely hailed into state courts by resident plaintiffs, product manufacturers often face the unattractive prospect of being the out-of-state defendant facing a "home-town" plaintiff. Historically, a defendant's ability to remove such disputes to an impar-

[1] Pursuant to this Court's Rule 37.2, letters of consent have been filed with the Clerk.

tial federal court has been one of the few mechanisms available to it for "levelling the playing field." However, unless a federal court is empowered to distinguish between "real" and "fraudulent" diversity cases, meaningful access to the federal courts will be dramatically impaired.

Because the decision below threatens the foundations of federal removal practice, review by this Court is warranted. *Amici* urge the Court to grant the petition, to reaffirm its early holdings on the proper scope of the fraudulent joinder doctrine, and in so doing, to reaffirm the viability of diversity jurisdiction and the important protections which it offers the non-resident defendant.

REASONS FOR GRANTING THE PETITION

Beyond presenting a substantial federal question over which the lower courts are divided, the petition raises an issue of overriding concern to the American business community, for it involves the basic procedural right out-of-state defendants have long enjoyed in our judicial system to have claims asserted against them heard in a neutral federal forum. Departing from this Court's precedents, the decision below announces a new "fraudulent joinder" standard that vitiates this basic right by permitting a plaintiff to destroy diversity jurisdiction through the artifice of naming as a "defendant" a non-diverse party against whom the plaintiff has *no* intention of pursuing a claim. The practical effect of such a rule is to invite plaintiffs throughout the country to join non-diverse defendants *solely* for the purpose of defeating federal jurisdiction, resting secure in the knowledge that the federal courts would, under this standard, be *barred* from considering even clear and convincing evidence of fraudulent joinder. Because the decision below is inconsistent with this Court's prior cases, creates a conflict within the circuit courts of appeal as to a basic question of federal jurisdiction, and is of far-reaching practical

consequence to litigants who routinely find themselves in our Nation's courts, *amici* respectfully urge the Court to grant the petition.

A. An out-of-state defendant (particularly a "deep pocket" manufacturer or other business entity) defending itself in state court against the serious personal injury claims of a local resident can present an ideal opportunity for a plaintiff and his lawyer. Not only may the local court be familiar terrain to plaintiff's counsel, often affording certain perceived procedural advantages over federal court, but many times the plaintiff will hope to take advantage of the sympathies of a local judge, who is frequently subject to popular electoral control. It is a simple fact of life that when in-state plaintiffs sue out-of-state defendants in state court, both political and practical forces have a tendency to tilt judgments toward the resident plaintiffs. As one sitting state supreme court justice recently acknowledged:

> Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development and compensation for injured users of products, the adoption of rules liberal to plaintiffs is simply self defense.

Blankenship v. General Motors Corp., 406 S.E.2d 781, 786 (W. Va. 1991). Though these comments were in context directed at the inclination of some state courts to fashion "pro-plaintiff" substantive law, the observation applies equally to procedural rights such as the right to remove to a federal forum. One need look no further than to the transparent gamesmanship of the respondent in this case for confirmation that state court is sometimes perceived

by both defendants and plaintiffs alike to offer an advantage to local plaintiffs when the defendant is from out-of-state.

Since the First Judiciary Act of 1789, removal to a federal court is the out-of-state defendant's recourse when faced with such a prospect. The right to remove to an impartial federal forum enables the defendant to impose some limited control in those cases where the potential for local prejudice and bias is perceived to be the greatest. As Justice Marshall observed long ago, in explaining the rationale for federal court diversity jurisdiction:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

B. That the decision below threatens to undo the important protections of federal removal and remand practice is aptly illustrated by the facts of this case. Here, the plaintiff sought to circumvent the diversity jurisdiction of the federal court by naming as a "defendant" a fellow citizen of Louisiana (Soileau) against whom he had no intention of pursuing a claim, but as to whom his lawyer could nevertheless manufacture a theory of liability. That plaintiff's joinder of Soileau was fraudulent is essentially undisputed. Solieau admitted under oath that plaintiff told him "not to worry" about the suit because he had no intention of pursuing the claim against him. Plaintiff made good on the promise by never attempting to prosecute the "claim": though Soileau never answered the complaint, plaintiff declined to move for a default judgment or to otherwise press his claim.

Soileau's sole function as a named party was to ensure a state court forum. And, as soon as the recently enacted one-year limitation on removal elapsed (*see* 28 U.S.C. § 1446(b)), plaintiff provided confirmation of his fraudulent intent by voluntarily dismissing Soileau from the suit.

Although the fraud committed on the district court here was established by clear and convincing evidence, the Fifth Circuit held this to be *irrelevant*. The only germane inquiry, according to the lower court's decision, is whether it is "possible" that the allegations against Soileau might have stated a cause of action under applicable law. Never mind that no actual "case or controversy" existed between the parties. As the petition demonstrates, by refusing to consider this undisputed evidence of actual fraud, the Fifth Circuit has ignored this Court's fraudulent joinder cases. They hold squarely that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). *See also Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146, 152 (1914). These cases also teach that "[f]ederal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right. . . ." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

Yet, by disregarding respondent's blatant manipulation of the judicial system, the Fifth Circuit has done exactly this: it has eviscerated a defendant's statutory right of removal, and with it a meaningful right of access to the federal courts, in a large category of cases. The reality of today's product liability laws, and the usual fact patterns to which they are applied, is that unprincipled plaintiff attorneys will usually be able to concoct some conceivable claim, however farfetched, against an in-state "sham defendant." In the workplace, there are always resident coworkers who can be named; within the stream

of commerce, there is likewise inevitably a resident manufacturer, supplier, distributor, or somebody's agent to serve as a "dummy" defendant. Without a mechanism for checking this abuse, the result for defendants is that, in many cases, diversity jurisdiction and the protections it offers will become a thing of the past.

C. The Fifth Circuit's proposed fraudulent joinder standard—which permits "feigned claims" against "phantom defendants" to destroy federal court jurisdiction—is also fundamentally at odds with this Court's cases holding that collusive lawsuits are not actual "cases or controversies" for purposes of evaluating Article III jurisdiction. If, for example, the plaintiff and defendant in this case had concocted a sham arrangement for the purpose of *creating* federal court jurisdiction, it is clear that the court below would have been required to dismiss the suit for want of a case or controversy. 28 U.S.C. § 1359 ("A district court will not have jurisdiction of a civil action in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *see Smith v. Sperling*, 354 U.S. 91, 97 (1957) ("collusion to satisfy the jurisdictional requirements . . . will always defeat jurisdiction"). Just as clearly, a party ought not be permitted to *rob* a federal court of jurisdiction based on the assertion of an entirely fictitious claim. A "claim" which a plaintiff never intends to pursue is no claim at all. In evaluating its jurisdiction, the district court ought to determine what *actual* parties and what *actual* claims are before it and, in so doing, should disregard a "defendant" and a "claim" that are present in a lawsuit *exclusively* for the purpose of defeating jurisdiction. By contrast, the effect of the decision below is to elevate form over substance by requiring the district courts to consider only the theoretical viability of a cause of action, while blinding themselves to uncontradicted evidence of actual fraud.[2]

[2] Over time, this Court has consistently protected diversity jurisdiction from artificial enlargement *or* restriction precisely

D. The manifest incorrectness of the lower court's decision on an important question of federal jurisdiction is but one of the grounds for granting the petition. Of equal concern to *amici* is the conflict created by the Fifth Circuit's decision with the law of other circuits (*see* Pet. 10-12) and the potential confusion this will cause for defendants who are regularly subject to lawsuits in multiple jurisdictions. Left undisturbed, the decision below creates a situation in which a defendant's right to remove a case to federal court—and to stay there by being able to prove fraudulent joinder in egregious cases like this one—will turn solely on *where* the plaintiff initially sues. For defendants like *amici*, with nationwide operations and distribution networks, it is difficult enough to contend with the existing "patchwork quilt" of substantive state product liability law, without also having to face inconsistency in the application of a basic federal procedural right. While the former problem is plainly an issue for Congress to address, it is for this Court to ensure that

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like that sanctioned by the Fifth Circuit here. "The duties of this Court, to exercise jurisdiction where it is conferred, and not to usurp it, where it is not conferred, are of equal obligation." *Devaux*, 9 U.S. at 87. *See also Wecker*, 204 U.S. at 186. For example, parties may not create or destroy diversity jurisdiction by the artificial alignment of the parties; the court will go beyond the face of a complaint to realign parties according to their true interests, whether the result is to create or defeat jurisdiction. *See, e.g., City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) ("Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit.'"). *See also Pacific R.R. v. Ketchum*, 101 U.S. 289, 298 (1879). Likewise, diversity jurisdiction cannot be destroyed by manipulation of the *ad damnum*. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If the plaintiff could . . . reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice."). Indeed, even the Fifth Circuit will not permit a plaintiff to destroy diversity jurisdiction by adding a defendant against whom recovery is not possible under the facts. Pet. App. 8a.

"[t]he removal statute, which is nationwide in its operation, [ ] be uniform in its application." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941). For this additional reason, guidance from this Court is warranted here.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

VICTOR E. SCHWARTZ
LUTHER ZEIGLER *
KATHRYN D. KIRMAYER

CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Amici Curiae

October 13, 1992

* Counsel of Record

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---

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WILLIAM MOSS
Director
LAWYERS FOR CIVIL JUSTICE
1225 19th Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 429-0045
Counsel for Amicus Curiae

October 13, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a plaintiff has an absolute right fraudulently to join a party for the sole purpose of defeating federal diversity jurisdiction so long as the complaint adequately alleges a cause of action against a third party.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-433

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus Lawyers for Civil Justice ("LCJ") is a nationwide coalition of corporate and defense counsel. LCJ works closely with over 60 state defense bar associations throughout the country. Its members are litigators and litigation managers who are engaged in a substantial amount of civil litigation, much of it complex, in the state and federal courts of the United States. LCJ and its members are vitally interested in developing workable improvements to the civil justice system that are fair and equitable to all parties.[1]

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court.

REASONS FOR GRANTING THE PETITION

1. The right to remove cases from state to federal courts, with its origins to the Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 12, has been part of federal law as long as diversity jurisdiction itself, and was designed to serve the same purposes. 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3721, at 187 (2d ed. 1985) (hereinafter "Wright, Miller & Cooper"). Those purposes most commonly have been to protect out-of-state litigants from "local prejudices and sectional views." *Burgess* v. *Seligman*, 107 U.S. 20, 34 (1883). More specifically, access to federal courts exists "to protect commercial interests from class bias." 13B Wright, Miller & Cooper, § 3601, at 339. Diversity jurisdiction was thus designed "to foster investment and commerce across state lines by ensuring impartial administration of the law and protecting out-of-state litigants from local prejudices." Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote the Other Way With Its Feet?*, 61 N.Y. St. B.J. 20, 20 (1989).[2]

While some of the "sectional views" and intra-state jealousies of the Nation's early years may have faded, "[t]he 'hometown decision' and the one-industry county are continuing realities," and "[b]ias still seems to exist with respect to persons and corporations from a more distant part of the country." *Id.* at 21.[3] Indeed, out-of-

[2] *See also* Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 3, 27-28 (1948).

[3] In Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 339 (1977), the author quotes one judge in the old Fifth Circuit as observing:

> There are state courts in some areas where, from my experience as a practicing lawyer and my observation as a judge, such a forum [where a litigant can feel he is getting a fair trial] is not available to a nonresident plaintiff, individual or corporate. The result is sometimes a foregone conclusion in less populated areas. . . . The reasons for the creation of diversity jurisdiction still exist in many areas of the country, in my opinion.

state corporations may well be one of the principal objects of local prejudice.[4] Moreover, because

> state venue provisions often localize the place of trial in small constituencies[,] . . . justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the 'court house gang' . . . . [T]he federal courts, with their juries drawn on a district-wide basis and with their judges appointed for life by the President, have always protected out-of-staters from this type of inadequacy of justice.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft*, 106-07 (1969) (hereinafter "ALI Study").[5]

Although empirical evidence of bias and impediments to impartial adjudication is difficult to gather, these problems are by no means theoretical. It is widely accepted, for example, that Pennzoil's ability to try its now-famous case against Texaco before a Texas state court jury was a key to obtaining one of the largest verdicts in American history. As the West Virginia Supreme Court explained,

> [a]lthough the name Texaco suggests that the company might get a friendly hearing in Texas, this has long since ceased being the case. Texaco long ago stopped wearing cowboy boots and ten-gallon hats, moved its corporate headquarters to the suburbs of New York City, and tried very hard to forget its humble origins in the Texas boondocks. Pennzoil, on the other hand, continues to maintain its corporate headquarters in Houston. And so it came to pass that Pennzoil sued Texaco in a friendly, home-town

[4] *See* 14A Wright, Miller & Cooper, § 3601, at 357 n.68.

[5] *See also* R. Neely, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts*, 61-62 (1988).

> Texas state trial court where it recovered a judgment (including a punitive damages award of $3 *billion*) that, after the inclusion of interest and costs, exceeded the gross national product of over one-quarter of the member states of the United Nations.
>
> . . .

Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907 n.5 (W. Va. 1991).[6]

Similarly, in the litigation over baseball star Pete Rose's expulsion from major league baseball for allegedly betting on the game, Rose tried desperately—and with some initial success—to have his case heard in state court. As one commentator explained, "[t]he state judge, Norbert Nadel, was up for re-election in 1990, and, given Rose's extreme popularity in Cincinnati, it was widely thought that as a political matter he had little choice but to bend over backwards for Rose." Neiman, *"Root, Root, Root for the Home Team": Pete Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. Rev. 148, 150 n.15 (1991). See also ALI Study at 160 ("[s]o long as diversity jurisdiction exists . . . the need for its assertion may well be greatest when the plaintiff tries hardest to defeat it").

2. The extraordinary and improper lengths to which respondent's counsel went in this case to attempt to prevent litigation in federal court likewise speak volumes about the benefits counsel perceived in a "home court" advantage. The district court found after a hearing that respondent engaged in "a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction," then

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[6] Thus, "[a]ctual prejudice aside, there remains the matter of the *appearance* of prejudice, or the belief of an out-of-state party that he may be the victim of prejudice. . . . This is a matter of no little consequence in a nation that prides itself not only on doing justice, but on being seen to do justice." Shapiro, *supra* n.3, at 330 (emphasis in original).

"flaunt[ed]" Section 1446(b)'s subsequently enacted one-year limitation as a bar to petitioner's right to remove the case to a federal forum. Pet. App. 13a. Notwithstanding this Court's admonition that "the Federal courts should not sanction devices intended to prevent a removal," *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907), the Fifth Circuit held that district courts are powerless to remedy fraudulent joinders of diversity-destroying defendants unless the plaintiff's bad faith is plain on the face of the complaint. The Fifth Circuit's extraordinary and unduly narrow standard of procedural fraud conflicts with the standards announced by this Court and followed by the Third and Tenth Circuits, and effectively vitiates the important protections of the removal statute.

a. As this Court has long recognized, the equitable principle that "no man may take advantage of his own wrong [is] . . . [d]eeply rooted in our jurisprudence . . . and has frequently been employed to bar inequitable reliance on statutes of limitations." *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959). The doctrine that "[e]quity will not lend itself to . . . fraud . . . is read into every federal statute of limitation." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946).[7] Indeed, the need to protect litigants and courts from fraudulent misuse of the judicial system is so important that courts may set aside final judgments at any time in order to remedy fraud upon the courts. See Fed. R. Civ. P. 60(b).

Despite these well-settled principles, the Fifth Circuit ruled that, except in cases involving the pleading of juris-

[7] *See also Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990) (equitable tolling applies in suits against government notwithstanding requirement that waivers of sovereign immunity be narrowly construed; *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 559 (1974) ("this Court has not hesitated to find the statutory period tolled or suspended by [fraudulent] conduct . . .").

dictional facts, the one-year limitation of 28 U.S.C. § 1446(b) may not be tolled unless it is clear from the pleadings themselves that "there [is] no possibility of a valid state cause of action being set forth against the in-state defendant(s)." Pet. App. 6a (internal quotation marks and citation omitted). Viewing "fraud in this context [as] a term of art," *id.*, the court of appeals concluded that a plaintiff's intention not to pursue claims against a diversity-destroying defendant did not render joinder of such a defendant improper. *Id.* at 9a. This "strict view of fraudulent joinder" (*id.* at 6a) is flatly inconsistent with this Court's cases.

In determining the propriety of diversity-defeating joinders, this Court has not limited its inquiry to an examination of whether the plaintiff's claim has a colorable legal basis, but has instead considered the plaintiff's "real purpose in joining" such a defendant, *Wecker*, 204 U.S. at 186, and the non-diverse defendant's "real connection to the controversy." *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). The Court has explained that where "a resident defendant is joined, the joinder, *although fair upon its face*, may be shown by a petition for removal to be only a sham or fraudulent device to prevent a removal." *Id.* (emphasis added).[8] And it has upheld refusals to remand where the facts presented to the district courts demonstrated that a plaintiff had joined a defendant "without any purpose to prosecute the action in good faith . . . and with the purpose of fraudulently defeating the employer's right of removal." *Id.* at 98.[9] In both *Wilson* and *Wecker*, moreover, the Court

[8] *See also Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146, 152 (1914) ("[W]hen . . . a resident defendant is joined with the non-resident, the joinder, *even although fair upon its face*, may be shown by a petition for removal to be only a fraudulent device to prevent a removal") (emphasis added).

[9] *See also Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 185 (1905) (upholding determination of improper joinder

found it unnecessary to decide the very question that the Fifth Circuit deemed dispositive—*i.e.*, whether the plaintiff could state a viable claim against the resident defendant.[10]

b. The Fifth Circuit's rule places it in conflict with the Tenth and Third Circuits, both of which have remained faithful to this Court's teachings. Citing *Wilson*, the Tenth Circuit has ruled that "upon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal." *Smoot* v. *Chicago, R.I. & Pac. R.R.*, 378 F.2d 879, 881-82 (10th Cir. 1967). Similarly, the Third Circuit has concluded that fraudulent joinder may be found both where there is no colorable legal basis for a claim brought against a resident defendant, "or no real intention in good faith to prosecute the action against" such a defendant. *Abels* v. *State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985). These circuits have recognized that where fraudulent joinder is alleged, courts may "pierce the pleadings, . . . [and] consider the entire record," *Smoot*, 378 F.2d at 882 (citations omitted), including whether the "[p]laintiffs' conduct . . . is con-

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"[i]n view of th[e] testimony and the apparent want of basis for the allegations of the petition as to [the resident defendant's] relations to" the case).

[10] *See Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 98-99 (1921) ("the parties differ as to whether local law gives any color for treating the employer and the coemployee as jointly liable. . . . But we do not find it necessary to solve this question. As the joinder was a sham and fraudulent . . . the result must be the same whether the local law makes for or against a joint liability"); *Wecker*, 204 U.S. at 183 ("Much discussion is had in this case as to whether . . . the corporation and [resident defendant] could be jointly held responsible to the plaintiff upon the allegations of the complaint, but we do not deem it necessary to determine that question").

sistent with an intention to actually proceed against" the resident defendant. *Abels*, 770 F.2d at 32.

c. The Fifth Circuit's contrary rule finds no support in logic or law. The principal evil of fraud is its capacity to deceive. Perversely, the Fifth Circuit's rule permits equitable tolling only in those cases where courts and litigants are least likely to be deceived by a plaintiff's bad faith. There is simply no sensible reason to limit equitable relief to fraudulent acts that are obvious. Indeed, cases involving other types of fraud upon the courts routinely entail inquires beyond the face of pleadings.[11]

In fact, the Fifth Circuit itself recognizes the need to pierce the pleadings to determine the validity of *jurisdictional* facts. Yet as this case and others demonstrate, the *bona fides* of a plaintiff's intent to pursue claims against resident defendants are as readily ascertainable as jurisdictional facts, which themselves can involve questions of intent.[12]

In any event, a need for certainty and ease of administration cannot take precedence over a defendant's statutory right to a federal forum. In cases cognizable under 28 U.S.C. § 1332, Congress has afforded defendants the right to remove actions to federal court where "none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (emphasis added). De-

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[11] *See, e.g., Toscano* v. *Commissioner*, 441 F.2d 930, 934 (9th Cir. 1971) (on motion under Rule 60(b), examining acts by prevailing party that "prevented the losing party from fully and fairly presenting his case or defense"); 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2870, at 255 (1973) (fraud upon the court includes bribery and other instances of improper influence upon the court).

[12] Jurisdictional facts, for example, may turn on such questions as whether a resident had responsibility for supervising workers or ensuring safety of the workplace. *See, e.g., Wecker*, 204 U.S. at 184-85.

spite the express statutory requirement of proper joinder, the Fifth Circuit has concluded that a plaintiff can deprive a defendant of its right of removal through bad faith and improper joinder of a resident defendant, provided the impropriety is not obvious. There is simply no basis in the language of the removal statute for such a perverse result.

The Fifth Circuit's rule permits plaintiffs to undermine entirely the protections that diversity jurisdiction provides out-of-state litigants simply by alleging a claim against an in-state defendant. The important public policy favoring access to federal court should not turn on mere allegations, when the falsity of those allegations has been clearly demonstrated as found by a trial court. In particular, access to federal court should not be denied where allegations are made with intent to defraud the court. This Court should review the decision below to enforce the centuries-old assurance from Congress that non-resident litigants will have access to "courts free from susceptibility to potential local bias," *Guarantee Trust Co.* v. *York*, 326 U.S. 99, 111 (1945), and to make clear that such access cannot be blocked by fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM MOSS
Director
LAWYERS FOR CIVIL JUSTICE
1225 19th Street, N.W.
Suite 470
Washington, D.C. 20036
(202) 429-0045
Counsel for Amicus Curiae

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No. 92-433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,

Petitioner,

v.

LOUIS J. BARATTINI, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Counsel for *Amicus Curiae*

Date: October 14, 1992

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a federal district court is powerless to retain jurisdiction over a case founded on diversity jurisdiction when the plaintiff adds a non-diverse defendant against whom he adequately alleges a cause of action and keeps that defendant in the case for at least a year, even when the district court finds that the defendant was added fraudulently, without intent to prosecute the cause of action, in a "blatant attempt to circumvent the federal court's exercise of diversity jurisdiction."

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No. 92-433

SEARS, ROEBUCK & COMPANY,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the interests of the free enterprise system. To that end, WLF has appeared before this Court as well as other state and federal courts in cases of interest to the business community.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as the notion has

spread that businesses have infinitely deep pockets from which they can compensate individual citizens for any and all misfortune that may befall them. Judges and juries who have succumbed to that notion are particularly apt to assign no-fault liability to corporations based outside the forum state. Accordingly, WLF has filed briefs in numerous cases that challenge state judicial procedures that discriminate against out-of-state defendants. *See, e.g., Burlington Northern R. Co. v. Ford*, 112 S. Ct. 2184 (1992).

The federal court's removal jurisdiction provides one very important check upon discrimination against out-of-state defendants. WLF is concerned that the decision below, by turning a blind eye to fraudulent measures designed to defeat federal court removal jurisdiction, will cause great harm to businesses by greatly weakening one of their few remaining defenses against home-town, state-court juries.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, this case involves efforts by a Louisiana plaintiff to keep his lawsuit against an out-of-state company in the Louisiana courts, and out of the federal courts. His efforts included an attempt to defeat federal court jurisdiction (based on diversity of citizenship between the parties) by adding a neighbor as a defendant despite lacking any intent to pursue a judgment against that neighbor. This case turns on whether the addition of that

neighbor (with the result that complete diversity of citizenship between plaintiffs and defendants no longer existed) destroyed the federal court's diversity jurisdiction.

The underlying lawsuit is a product liability suit filed in November 1987 in Louisiana state court by Respondent Louis J. Barattini against Petitioner Sears, Roebuck & Co. ("Sears"). Mr. Barattini alleges that he severely injured his hand while operating a Sears ten-inch radial saw. The saw belonged to his neighbor, Eric Soileau.

Sears removed the case to federal court on November 23, 1987, and many months of pre-trial discovery followed. On June 24, 1988, less than six weeks before trial was set to begin (on August 1, 1988), Mr. Barattini moved for voluntary dismissal without prejudice, in order to allow him to refile the suit in state court, against both Sears and Mr. Soileau. The federal district court judge accomplished that same result by granting a motion to add Mr. Soileau to the action and thereafter remanding the case to state court. Pet. App. 2a.[1]

Mr. Soileau never filed an answer in the case. Nonetheless, Mr. Barattini never sought a default judgment against Mr. Soileau, nor even sought discovery from him. Instead, Mr. Barattini moved to dismiss Mr. Soileau from the suit in February 1991.[2]

The day after the dismissal was granted, Sears again removed the case to federal court. Mr. Barattini's motion

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[1] Although Sears is not a citizen of Louisiana, both Mr. Barattini and Mr. Soileau are. Accordingly, the addition of Mr. Soileau as a defendant destroyed the complete diversity of citizenship between plaintiffs and defendants necessary to maintain federal court diversity jurisdiction pursuant to 28 U.S.C. § 1332.

[2] Indeed, Mr. Soileau said in a sworn statement that he had been told by both Mr. Barattini and Mr. Barattini's counsel that they never had had any intention of pursuing their claim against him. Pet. App. 14a-21a.

to remand the case once again to state court was denied by the federal district judge; he held that Mr. Barattini's addition of Mr. Soileau to the suit was a "fraudulent" attempt to defeat diversity jurisdiction. Pet. App. 13a. The district court held that although a claim "conceivably existed under Louisiana law" against Mr. Soileau, that claim was insufficient to defeat diversity jurisdiction because Mr. Barattini had never intended to proceed against Mr. Soileau but rather was engaged in "a blatant attempt to circumvent the federal court's exercise of diversity jurisdiction." *Id.*

The case went to trial in November 1991, resulting in a judgment for Sears. Pet. App. 11a. The United States Court of Appeals for the Fifth Circuit vacated that judgment on June 12, 1992 and remanded the case to the district court with instructions to remand to state court. Pet. App. 10a. The Fifth Circuit held that, for purposes of determining whether the case had properly been removed to federal court, it was irrelevant that Mr. Barattini never intended to pursue a judgment against Mr. Soileau and that his sole purpose in joining Mr. Soileau was to defeat diversity jurisdiction. Pet. App. 8a. The court held that so long as the complaint states a "viable cause of action" against a non-diverse defendant, removal of a case to federal court based on diversity jurisdiction is improper. *Id.* The court held that although removal *can* be permissible following the voluntary dismissal of all non-diverse defendants, it was impermissible in this case because it occurred after expiration of the one-year limitation period for removals imposed by 28 U.S.C. § 1446(b). Pet. App. 4a.[3]

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[3] The court of appeals held that because the addition of Mr. Soileau was not "fraudulent" (and therefore could be invoked to defeat diversity jurisdiction), it did not need to decide the extent to which 28 U.S.C. § 1446(b)'s one-year limitation period is tolled by the fraudulent addition of a non-diverse defendant. Pet. App. 4a.

Sears thereafter sought review of the Fifth Circuit's decision by filing its certiorari petition.[4] WLF urges the Court to grant that petition.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS'S DECISION SERIOUSLY MISREADS CONGRESSIONAL INTENT IN ADOPTING THE ONE-YEAR LIMITATION PERIOD FOR REMOVAL OF CASES TO FEDERAL COURT

It cannot seriously be disputed that, had the case been decided prior to the 1988 amendments to the federal removal statutes, Sears's removal of the case to federal court would not have been subject to attack. Prior to the 1988 amendments, Sears would have been entitled -- pursuant to 28 U.S.C. § 1446(b) -- to remove the case at any time within 30 days of Mr. Barattini's voluntary dismissal of his claim against Mr. Soileau.[5] Thus, the result reached by the Fifth Circuit can only be correct if Congress intended by its 1988 amendments to reverse the

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[4] Sears served its petition on counsel for Mr. Barattini by mail on September 10, 1992. Accordingly, *amicus* briefs are timely if filed by October 14, 1992.

[5] Between 1949 and 1988, the second paragraph of § 1446(b) read as follows:

> If the case stated in the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

This Court has long held that the plaintiff's voluntary dismissal of non-diverse defendants renders removable a case that previously would have been removable but for the presence of the non-diverse defendants. *See, e.g., Powers v. Chesapeake & Ohio Railway*, 169 U.S. 92 (1898).

result in cases involving facts similar to those presented in this case.

Congress had no such intent when it amended § 1446(b) as part of the Judicial Improvements and Access to Justice Act of 1988 (the "1988 Act"). Accordingly, the Fifth Circuit's interpretation of § 1446(b) as amended is clearly erroneous.

The 1988 Act added a clause to § 1446(b) such that the provision permitting removal even when the case stated by the initial complaint is not removable is now limited to removal petitions filed within one year of the commencement of the action.[6] The legislative history of the 1988 Act makes clear that Congress did not have cases of this sort in mind when it adopted the one-year limitation on removals. The House Report on the amendment to § 1446(b) states that the limitation period was imposed "as a means of reducing the opportunity for removal after substantial progress has been made in state court." H.R. Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032 (1988). The House Report went on to explain:

> The result [of the amendment to § 1446(b)] is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create *for the first time* a party alignment that supports diversity jurisdiction. Under § 1446(b) removal is possible whenever this event occurs, so long as the change

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[6] The language added to § 1446(b) by the 1988 Act provides as follows:

> . . . except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [providing for diversity jurisdiction] more than 1 year after commencement of the action.

> in parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.

Id. at 6032-6033 (emphasis added).

There is no claim that Sears delayed a trial by removing the case to federal court; accordingly, the purposes underlying the 1988 Act's one-year limitation period are not implicated in this case. Indeed, it was Respondent Barattini who needlessly delayed and disrupted these proceedings by -- on the eve of a federal court trial after substantial progress had been made on discovery matters -- joining a non-diverse defendant for the sole purpose of destroying diversity jurisdiction and thereby obtaining a remand to state court.

Moreover, Sears is in literal compliance with the amended language of § 1446(b): it did, in fact, first remove the case (on November 23, 1987) within one year of commencement of the action (on November 4, 1987). Nothing in amended § 1446(b) states that the requirements of the one-year limitation period can only be met by a timely filing of the *last* removal petition; so long as Sears properly filed *a* removal petition based on diversity of citizenship within one year of commencement of the action (and it did so), nothing in § 1446(b) prevents the filing of a subsequent removal petition when the other conditions of § 1446(b) are met.

Furthermore, limitation periods imposed by § 1446(b) have always been considered not to be "jurisdictional" in nature and thus to be subject to extension under appropriate circumstances. *See, e.g., Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 n.4 (7th Cir. 1992); 1A *Moore's Federal Practice* ¶ 0.168[3.-5-7] at 601 (1985). It is difficult to imagine a more appropriate case in which to permit the filing of a second removal petition more than

one year after commencement of the action than when: (1) it is the *plaintiff* who has delayed trial by obtaining a remand on the eve of a scheduled trial in federal court; (2) the plaintiff's addition of a non-diverse was for no purpose other than to destroy diversity among the parties and thus force a remand; and (3) the second removal petition, filed after the plaintiff had revealed his hand by failing to pursue his action against the non-diverse defendant and later voluntarily dismissing the action, did not result in last-minute delay of a state-court trial.

In sum, regardless whether Mr. Barattini was guilty of "fraudulent joinder" -- as that term has traditionally been understood -- in adding Mr. Soileau as a defendant, Sears was acting well within its rights under 28 U.S.C. § 1446(b) in filing a second removal petition in this case. The Fifth Circuit's contrary interpretation of amended § 1446(b) was based on a serious misreading of the language and purposes of that statute. The Court should grant certiorari to correct that error.

II. MR. BARATTINI'S JOINDER OF MR. SOILEAU AS A DEFENDANT FOR THE SOLE PURPOSE OF DEFEATING DIVERSITY JURISDICTION WAS "FRAUDULENT" AS THAT TERM HAS TRADITIONALLY BEEN UNDERSTOOD

This Court has long recognized that federal court removal jurisdiction is not defeated by the "fraudulent joinder" of a defendant added by the plaintiff solely for the purpose of destroying complete diversity of citizenship among the parties. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921).

Indeed, the Fifth Circuit in this case recognized the existence of a "fraudulent joinder" exception to the complete diversity requirement normally applicable to removal petitions based on diversity jurisdiction. Nonetheless, the court of appeals defined that exception in an inappropriately narrow fashion. The court held:

> In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Pet. App. 5a (quoting *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A 1981)(emphasis in original).

Applying that definition of "fraudulent joinder" to this case, the Fifth Circuit found that Mr. Barattini's joinder of Mr. Soileau as a defendant was not fraudulent. The court of appeals held (and Sears did not seriously contest) that the amended complaint stated a viable cause of action against Mr. Soileau and that the jurisdictional facts alleged by Mr. Barattini were not fraudulent (*i.e.*, Mr. Soileau really was, as alleged, a citizen of Louisiana). Pet. App. 5a-9a.

The Fifth Circuit's definition of what constitutes "fraudulent joinder" is in clear conflict with this Court's *Wilson* decision as well as more recent decisions from other courts of appeals. *Wilson* involved facts remarkably similar to those in this case. The plaintiff in *Wilson* (an Alabama citizen) sued his employer (not an Alabama citizen) for injuries sustained on the job. Also named in the complaint was one of the plaintiff's fellow employees (also an Alabama citizen), who was alleged to be liable for the plaintiff's injuries based on a common law negligence theory.

Wilson came to the Court on the question of whether the employer properly removed the case to federal court on the basis of diversity jurisdiction. There was no indication in the Court's opinion that the plaintiff had flunked the Fifth Circuit's standards; *i.e.*, that the plaintiff had failed to state a viable cause of action against his fellow employee or that the fellow employee was not really

an Alabama citizen. The Court nonetheless held that the plaintiff had been guilty of "fraudulent joinder" in adding his fellow employee as a defendant, because he was added "without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal." *Wilson*, 257 U.S. at 98. In other words, joinder is "fraudulent" (and thus does not defeat removal) whenever (as the district court found to be true here) the non-diverse defendant was added without any purpose of prosecuting the action in good faith -- regardless whether the complaint states a viable cause of action against the non-diverse defendant.

The Fifth Circuit standard is also at odds with leading commentators and with recent decisions from other courts of appeals. *See, e.g.*, 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3723 at 613-17 (1976)("A party will be considered fraudulently joined when plaintiff has not stated a claim for relief or *does not intend to secure a judgment*")(emphasis added); *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 32 (3d Cir. 1985)("Courts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment*")(emphasis added).

In sum, the Fifth Circuit's crabbed definition of "fraudulent joinder" is in conflict with the definitions employed both by this Court in *Wilson* and by other courts of appeals. The Court should grant certiorari in order to resolve that conflict.

III. THE COURT OF APPEALS'S DECISION DEPRIVES OUT-OF-STATE DEFENDANTS OF A MUCH-NEEDED SHIELD AGAINST HOME-TOWN VERDICTS

A basic misconception that permeates the Fifth Circuit's decision in this case is that its task consists of

nothing more than ensuring the efficient allocation of litigation between the state and federal courts. Missing from the court of appeals's analysis is any recognition of the basic rationale underlying the existence of federal court removal jurisdiction: to protect out-of-state defendants from the bias that state courts may harbor in favor of in-state plaintiffs. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3721 at 515 (1976) ("the right of removal probably was designed to protect nonresidents from the local prejudices of state courts").[7]

Indeed, WLF is filing this brief not out of any abstract interest in arcane federal court jurisdictional provisions, but due to its repeated observation of state-court bias in favor of in-state plaintiffs suing out-of-state defendants, particularly when the defendant is a business entity and is perceived as being deep-pocketed. There is no reason to suspect that state court judges and juries are any less biased against out-of-state defendants than they were at the time that removal jurisdiction based on diversity of citizenship was first adopted in 1875.[8] Such a bias makes perfect economic sense: requiring an out-of-state defendant to pay damages to an in-state plaintiff brings added revenues into the forum state and has very little down side. While the out-of-state business entity that is harmed by the damage award may be forced out of business or otherwise be forced to lay off employees, the employees in all probability are from another state.

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[7] That removal jurisdiction was designed to protect out-of-state defendants from local prejudices of state courts is borne out by the provision limiting the right of removal based on diversity of citizenship to defendants who are *not* citizens of the forum state. 28 U.S.C. § 1441(b).

[8] The high frequency with which this Court must deal with Commerce Clause challenges to state government bias against out-of-state firms is a testament to the natural tendency of states and their citizens to discriminate against out-of-state business entities. Often, that bias is reflected in state-court procedural rules, such as state-court venue provisions. *See, e.g., Burlington Northern R. Co. v. Ford*, 112 S. Ct. 2184 (1992).

Small businesses are likely to be particularly affected by this built-in state-court bias against out-of-state defendants. Large corporations often are better positioned to absorb the costs associated with state-court bias as a regular cost of doing business and frequently will be in a position to spread the costs to the consuming public by building those costs into their pricing structure. Small businesses rarely have that luxury, both because they often are unable to obtain adequate liability insurance and because they are less likely than larger corporations to have significant control over their pricing structure.

WLF recognizes that there need to be limits on a defendant's right to challenge the propriety of the joinder of non-diverse defendants; otherwise, courts will become bogged down in lengthy evidentiary hearings into the plaintiff's subjective intent in joining a particular defendant. Such hearings would not be a wise use of judicial resources. Moreover, the burden of proof should be quite high on any defendant who challenges joinder on the ground that the plaintiff has no subjective intent of proceeding to judgment against the non-diverse defendant.

But when, as here, the defendant has introduced conclusive proof of such intent, the courts should not hesitate to label the plaintiff's action a "fraudulent joinder" and to recognize the substance, rather than the form, of that action. Otherwise, Congress's inclusion of a one-year limitation period on removal petitions -- while intended solely to prevent last-minute disruptions of imminent state-court trials -- will be turned into a powerful weapon for in-state plaintiffs who seek to deny defendants their removal option; and the plaintiffs who will be most rewarded will be those clever enough to hide their fraud for more than one year.

In sum, the tremendous danger of prejudice to out-of-state defendants created by the Fifth Circuit's decision -- a danger exacerbated by the 1988 Act's creation of a one-year limitation period for removal petitions -- counsels in

favor of granting Sears's petition for certiorari to resolve the conflict between the Fifth Circuit's decision and other court decisions in this area.

CONCLUSION

For the foregoing reasons, WLF respectfully submits that the petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

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No. 92-433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

ARTHUR R. MILLER
Langdell West 227
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4111

PAUL V. CASSISA, SR.
CARL J. GIFFIN, JR.
BERNARD, CASSISA, SAPORITO & ELLIOTT
1615 Metairie Road
Metairie, Louisiana 70055

REX E. LEE *
CARTER G. PHILLIPS
JEFFREY T. GREEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

October 15, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONER

The district court correctly found that respondent's counsel perpetrated an outrageous fraud on the court for the sole purpose of depriving it of jurisdiction. The court of appeals did not dispute that finding, and notwithstanding respondent's counsel's post hoc rationalizations, there is no doubt that respondent acted in absolute bad faith.[1] Thus, this case presents as starkly as

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[1] The district court's finding was based on a series of events, most of which respondent simply chooses to ignore in his opposition. For instance, he makes no mention of the fact that *his* law firm also represented Soileau or that in more than two years no action was

possible the issue of whether it is ever permissible to look beyond the pleadings when considering whether the joinder of an in-state defendant should be permitted.

In the petition, Sears demonstrated that this Court held in a series of older decisions that such an inquiry is permissible. It also demonstrated that the Third and Tenth Circuits unquestionably have gone beyond the pleadings and considered facts specific to the litigants (other than residence) in refusing to allow a joinder for the sole purpose of destroying diversity.

To be sure, the Fifth Circuit's holding in this case is not unique. Respondent rightly demonstrates that a substantial number of lower federal courts follow the same wooden approach adopted below. And petitioner concedes that there is some language in opinions of this Court (none of which was necessary to a decision) that supports the decision below. But all that shows is that the issue is a recurring one. Respondent's argument does not eliminate the inconsistent language in this Court's opinions and it does not eliminate the conflict between the Tenth and Third Circuits and the Fifth Circuit. At bottom, the opposition essentially proves the correctness of the petition's claim that this case warrants review.

Respondent makes a number of disparate arguments that are aimed at persuading the Court to deny review. These arguments warrant a brief reply.

1. Respondent first asserts that the plain language of 28 U.S.C. § 1446(b) categorically precludes asserting fraudulent joinder more than one year after remand. Opp. 6-8. The argument is unavailing for at least two reasons: First, respondent ignores the threshold lan-

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ever taken against Soileau during proceedings before the state court. Those facts, coupled with Soileau's statement that he was assured that no effort would be made to obtain a judgment or collect a judgment, completely undermine respondent's thirteenth-hour claim of innocence. *See* Pet. 5-6.

guage of § 1446(b) providing for a right of removal where "none of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." See Brief Of Lawyers For Civil Justice As *Amicus Curiae* In Support Of Petitioner, at 8 (quoting 28 U.S.C. § 1441(b)). Thus, § 1446(b) on its face envisions the exception argued for by petitioner. Second, even if the one-year bar were more categorical than it is, the argument fails to account for the well-established doctrine that "fraud" always stands as an exception to all procedural rules.[2] See Pet. 12 n.5 (citing *Morris* v. *Gilmer*, 129 U.S. 315, 329 (1889); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907)). Indeed, respondent's attempt to analogize § 1446(b) to a statute of limitations (Opp. 7) does him far more harm than good. In *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), this Court found "[d]eeply rooted in our jurisprudence" the principle that no party "may take advantage of his own wrong," which "has frequently been employed to bar inequitable reliance on *statutes of limitations*." *Id.* at 232-33 (emphasis added). See also *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946) (the doctrine that "[e]quity will not lend itself to . . . fraud . . . is read into every federal statute of limitations").[3]

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[2] Respondent's argument (Opp. 15) that the district court's initial decision to permit respondent to amend his complaint to add the nondiverse defendant, Eric Soileau, is res judicata fails for this same reason. Moreover, contrary to respondent's claim, there is no evidence in the record that the district court found this to be a "proper joinder." When initially allowing respondent to amend, the district court gravely warned respondent against a joinder for the purpose of defeating the jurisdiction of the court. *See* 6/29/88 Hearing Transcript, at 19 ("[Y]ou would not do this just to divest the Federal Court of jurisdiction, because then I would slap you with sanctions").

[3] Even *final judgments* must be set aside if a district court finds fraud, because " 'a decision produced by fraud on the court is not

2. Respondent attempts to distinguish factually the cases upon which petitioner relies. Opp. 17-24. This effort fails. In each of the cases cited by petitioner, this Court and the various courts of appeal announce a standard that allows a district court to consider a plaintiff's bad faith in joining a diversity-destroying defendant for the sole purpose of defeating the statutory right of removal. For example, in *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the Court *held* that whether "the local law makes for or against a joint liability" the joinder was fraudulent because it was "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the [resident defendant]." *Id.* at 98-99.

Respondent places much reliance upon the conjunctive clause "without any basis in fact," but it is clear from these cases that this phrase does *not* mean that a defendant seeking removal must show that a plaintiff has falsely pleaded jurisdictional facts or that the plaintiff had no plausible cause of action whatsoever against the resident defendant. Instead, these cases emphasize that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having *no real connection with the controversy.*" *Id.* at 97 (emphasis added); *Chesapeake & Ohio Ry.* v. *Cockrell*, 232 U.S. 146, 152 (1914) (identical language). In addition, as Justice Holmes explained in *Illinois Central R.R.* v. *Sheegog*, 215 U.S. 308 (1909), a plaintiff may "sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, *without other ground for the charge than that its only purpose was to prevent removal*, would be bad on its face." *Id.* at 316 (emphasis added). Here, however, the district

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in essence a decision at all and never becomes final.'" 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2870, p. 248 (1973) (quoting *Kenner* v. *Commissioner*, 387 F.2d 689, 691 (7th Cir.), *cert. denied*, 393 U.S. 841 (1968)) (hereafter "Wright & Miller").

court's factual findings amply demonstrate that Soileau had "no real connection" to this controversy and that respondent's only purpose for joinder was to defeat federal jurisdiction.

Similarly, in *Abels* v. *State Farm Fire & Casualty Co.*, 770 F.2d 26 (3d Cir. 1985), the Third Circuit observed that "[c]ourts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.*" *Id.* at 32 (quoting *Goldberg* v. *CPC Int'l, Inc.*, 495 F. Supp. 233, 239 (N.D. Cal. 1980)) (emphasis added). Despite respondent's attempts to distinguish this case as one involving "Doe" defendants (Opp. 21), the *Abels* court found that the Doe defendants were sufficiently identified, 770 F.2d at 31, and the case upon which the *Abels* court relied made a similar finding. See *Goldberg* v. *CPC Int'l, Inc.*, 495 F. Supp. 233, 238-39 (N.D. Cal. 1980).[4]

In conceding that a district court may "pierce the pleadings" to determine whether a joinder is fraudulent (Opp. 19), respondent also concedes the relevance of both of the Tenth Circuit cases relied upon in the petition. Those cases stand for the proposition that "federal courts may look beyond the pleadings to determine if the joinder, *although fair on its face*, is a sham or fraudulent device to prevent removal." *Smoot* v. *Chicago, R.I. & Pac. Ry.*, 378 F.2d 879, 882 (10th Cir. 1967) (citing *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921)) (emphasis added); *Dodd* v. *Fawcett Publications, Inc.*, 329

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[4] Moreover, *Goldberg* cites *Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) and *Chicago, R.I. & Pac. Ry.* v. *Schwyhart*, 227 U.S. 184, 194 (1913), as the lead cases supporting its fraudulent joinder standard, which the Third Circuit adopted in *Abels* and reiterated in *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 959 (1991).

F.2d 82, 85 (10th Cir. 1964) ("the court may pierce the pleadings, . . . consider the entire record, and determine the basis of joinder by any means available . . .") (internal citations omitted). The Fifth Circuit, however, would only "pierce the pleadings" to examine whether a plaintiff can possibly recover from the resident defendant. Pet. 8a. In sum, this is a conflict among the circuits that requires resolution by this Court.[5]

3. Respondent's final argument is that the practical effect of overturning the Fifth Circuit's overly narrow fraudulent joinder standards would be a "proliferation of district court hearings on the motives and intentions of plaintiffs." Opp. 26. But, as respondent admits, district courts already "pierce the pleadings" to determine whether a diversity-destroying defendant was fraudulently joined. Opp. 19. There is no reason to think that a district court's inquiry into whether jurisdictional facts were falsely pleaded—or whether "consider[ing] the entire record," *Dodd*, 329 F.2d at 85, a cause of action has in fact been stated—would be any less time consuming or more "objective" an inquiry into whether the plaintiff's *sole* purpose is to defeat the defendant's statutory right of removal. This is especially true when, as the petition observes, the defendant seeking removal is under a "heavy burden" to show such bad faith by clear and convincing

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[5] Respondent also relies heavily upon language from cases and treatises which state that, in determining fraudulent joinder, the motive of the plaintiff is irrelevant. Respondent draws from this language his conclusion that "the motives of the plaintiff in joining a party are absolutely irrelevant." Opp. 11. But as the petition shows, such an "absolute" conclusion is invalid because it ignores the inevitable and critical proviso, *e.g.* 14A Wright & Miller § 3723, pp. 343-47 ("it is immaterial that the joinder of a particular party . . . is intended to defeat federal jurisdiction, *so long as it is not merely colorable or made in bad faith*") (emphasis added); *Illinois Cent. R.R.* v. *Sheegog*, 215 U.S. 308, 316 (1909) (whatever plaintiff's motive, "an allegation that the joinder of one of the defendants was fraudulent, *without other ground for the charge than that its only purpose was to prevent removal*, would be bad on its face").

evidence. See Pet. 13 n.6. In any event, if the burden of reopening a law suit even years after litigation has been concluded is justified where there is fraud on the court (see Fed. R. Civ. P. 60(b)), the "burden" of holding a hearing certainly does not justify blinking at the blatant fraud by respondent's counsel found in this case.

* * * *

As the briefs of *amici* ably show, a defendant's statutory right of removal remains a vital check against unfair attempts to seek a "home-town" advantage. The Fifth Circuit's narrow fraudulent joinder standard, however, would allow plaintiffs to abrogate this right in bad faith, simply by joining a defendant against whom some cause of action might plausibly be stated. Given the proliferation of product liability claims and the broad sweep of state product liability statutes, the policies which motivated the establishment of diversity jurisdiction and the concomitant right of removal remain as vital and pressing today as they were when these features of federal jurisdiction were first contemplated under the Judiciary Act of 1789. The fraudulent joinder doctrine thereafter arose in the common law as a means of ensuring that diversity-destroying defendants are "properly joined" under the federal removal statute. The petition therefore presents a question which this Court is uniquely suited to resolve and one that also is of paramount importance to this country's manufacturing industries. For these additional reasons, review by this Court is warranted.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR R. MILLER
Langdell West 227
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4111

PAUL V. CASSISA, SR.
CARL J. GIFFIN, JR.
BERNARD, CASSISA, SAPORITO & ELLIOTT
1615 Metairie Road
Metairie, Louisiana 70055

REX E. LEE *
CARTER G. PHILLIPS
JEFFREY T. GREEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

October 15, 1992

* Counsel of Record